

# The "Economic Liberalism" of Sir Edward Coke

Barbara Malament\*

Sir Edward Coke, master of the turbulent political and legal arenas of early Stuart England, ranks among his country's most influential jurists. Recent historiography has given him an additional role of special significance. His career is now considered a prism through which we may see the impending triumph of industrial capitalism and its ideological handmaiden, classical economic liberalism. Cast as spokesman for a burgeoning class of entrepreneurs, he is held to have served them through a broad attack on monopolies and the intricate regulatory structure of the Tudor state and to have reshaped the common law in conscious anticipation of *laissez-faire* precepts.

But Coke's career did not in fact fit this heuristic construct. He was not among the venturesome merchants and manufacturers of his age (1552-1634), and he was fickle in his regard for their interests. His opposition to monopolies was selective; he challenged neither the fundamentals of the prevailing regulatory structure nor the paternalistic ideas which supported it. In some instances his arguments resembled those of economic liberals. But always his underlying principles were as alien to the early nineteenth century as they were familiar to the sixteenth.

Those who have missed the distinctly Tudor cast of Coke's thinking have been either lawyers interested in establishing common law sanction for modern anti-trust theory<sup>1</sup> or historians seeking an ideological explanation for the origin of the Civil Wars. Long convinced that these wars arose over divergent definitions of English liberties or the respective authority of Parliament and Crown, historians traditionally<sup>2</sup> advanced a political interpretation of the protest against monopolies. It went something like this: statutory proscription of monopolies constituted the first invasion of the King's absolute prerogative.<sup>3</sup> It was

\* Doctoral Candidate in History, Yale University; B.A. 1963, Vassar College.

1. Coke's views were cited, for example, in one of the most famous American anti-trust cases, *Standard Oil Co. v. United States*, 221 U.S. 1, 51, 54 (1911). In this case, the company's interpretation of the early common law would seem to be the more accurate. See pp. 1345-58 *infra*.

2. For one important exception to the standard political argument, see 4 D. HUME, *HISTORY OF ENGLAND* 394 (rev. ed. 1850). As an early partisan of *laissez-faire*, Hume traced the origins of that theory back to the monopoly controversy and argued that the House of Commons had attempted to "give liberty to the trading part of the nation."

3. Following Fortescue, most Englishmen believed theirs to be a *dominium politicum*

effected by Coke and his "patriot" friends, who were known defenders of Parliament's jurisdiction in matters of taxation. Since the Crown received considerable sums of money in return for its favors, what Coke and his friends must have wanted was to remove the threat of royal financial independence. Though generally plausible,<sup>4</sup> this traditional analysis became suspect after the 1930's when historians began reinterpreting the struggles between Court and Country. Once they had settled upon an economic interpretation, historians found in the opposition to monopolies a suggestion<sup>5</sup> that Coke and the parliamentarians were early advocates of *laissez-faire*.

This suggestion threatens now to become dogmatic assertion. Yet even proponents of the *laissez-faire* thesis differ significantly among themselves. Ephraim Lipson,<sup>6</sup> Eli Heckscher,<sup>7</sup> and John N. Nef,<sup>8</sup> for example, cautiously suggested that Coke's views provided a link between mercantilist and classical economic theory. They pointed to his "aversion" to statutes regulating the terms of enclosure and apprenticeship and his narrow construction of their provisions, the ability of later litigants to cite his opinions when contesting modern forms of trade

*et regale* in which the Crown had a discretionary prerogative to act on the advice of its counsellors and also an inherent and absolute prerogative in matters such as defense and foreign affairs. Exclusive trade privileges originated in an effort to encourage self-sufficiency and to make England's international position more secure, hence the Crown claimed an absolute right to grant such privileges—a right which Parliament challenged directly by enacting the Statute of Monopolies in 1623, 21 Jac. 1, c. 3. For a lucid and exceptionally good discussion of why Coke and the parliamentarians did not realize the radical implications of their action and of the extraordinary consensus in theory, see M. JUBSON, *THE CRISIS OF THE CONSTITUTION* (1949).

4. It could not explain, however, Coke's repugnance to monopolies prior to his break with the Court. Nor could it explain why adherents of the Court Party such as Lionel Cranfield and even Francis Bacon urged reform from above—the abrogation of certain odious monopolies by the King. For Cranfield's views, see D. WILLSON, *THE PRIVY COUNCILLORS IN THE HOUSE OF COMMONS, 1604-1629*, at 45 (1940); for Bacon's views, see *Advice to Sir George Villiers* in 2 *THE WORKS OF BACON* 375, 385 (1841), where he describes monopolies as "cankers of all trading" and urges that they not be admitted "under specious colours of public good."

5. It is possible to interpret the Civil Wars as an economic conflict yet not ascribe to the partisans different economic theories. This is what Lawrence Stone, Trevor-Roper and R. H. Tawney have done, however tacitly, in their discussions of the gentry. As to monopolies, William H. Price has discussed the economic grievances regarding exclusive patents without deducing an ideological framework. See Price, *English Patents of Monopoly*, 1 *HARV. ECON. STUDIES* 70 (1913). And insofar as any differences of theory did exist, George Unwin suggested that they arose not because of any peculiar foresight or modernity but simply because merchants tended to prosper under freer conditions of trade than did manufacturers. Unwin's suggestion was hardly new and could not explain why so many of the protests against monopolies originated from unemployed craftsmen as opposed to thwarted merchants. But by revealing the conflict in mercantile and industrial interests and by enabling historians to assess how Court policy more nearly favored the latter, Unwin's study helped explain the merchants' impatience under the early Stuarts. See G. UNWIN, *INDUSTRIAL ORGANIZATION IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* (1904).

6. 3 E. LIPSON, *THE ECONOMIC HISTORY OF ENGLAND*, especially at 283 (1931).

7. 1 E. HECKSCHER, *MERCANTILISM* 291-94 (M. Shapiro trans. 1935).

8. J. NEF, *INDUSTRY AND GOVERNMENT IN FRANCE AND ENGLAND*, 42 (1962).

restraint, and the rhetoric of "free trade" which accompanied his denunciation of monopolies. Yet they confined themselves to the long-range implications of Coke's views. Nowhere did they ascribe to Coke a conscious anticipation of *laissez-faire*.

The more extreme position was adopted first by Donald O. Wagner<sup>9</sup> who argued that monopolies were not inconsistent with prevailing legal theory, that Coke deliberately distorted precedent in order to hold them unlawful. His argument was then endorsed by Christopher Hill,<sup>10</sup> who believed that a "liberal" Coke would reinforce his general interpretation of the early Stuart period. Having politicized Tawney's thesis<sup>11</sup> of an emergent capitalist ethos by linking Puritans, parliamentarians and merchants, and having concluded that their opposition to the Court was motivated by the latter's policy of industrial regulation, Hill placed Coke among the enterprising and the individualistic. Through Hill's interpretation, Coke became the ally of the Puritans, the spokesman who created common law sanction for their *laissez-faire* demands.

# I.

The facts of Coke's life, however, weaken Hill's general thesis. In a career of 60 years, Sir Edward spent nearly 40 attached to the Court as Solicitor and Attorney General, Chief Justice of the Court of Common Pleas and of the King's Bench.<sup>12</sup> By birth, he was a country gentleman from Norfolk; by devotion, an Anglican;<sup>13</sup> by conviction, a social con-

9. Wagner, *Coke and the Rise of Economic Liberalism*, 6 *ECON. HIST. REV.* 30 (1935). See also Wagner, *The Common Law and Free Enterprise: An Early Case of Monopoly*, 7 *ECON. HIST. REV.* 217 (1937). In both articles, Wagner was attempting to refute R. H. Tawney's proposition that the common law had an inherent bias in favor of economic individualism. See Tawney, *Introduction* to T. WILSON, *A DISCOURSE UPON USURY* (1938).

10. Hill tentatively endorsed Wagner's findings in C. HILL, *PURITANISM AND REVOLUTION* 28 (1964). Then, after further research, he elaborated upon Wagner's thesis. C. HILL, *INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION* 225-65 (1965).

11. This famous thesis first appeared in R. H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* (1926).

12. The dates of these appointments were 1592, 1593/94, 1606 and 1613 respectively.

13. "In his old age he agreed with the Puritans, but he continued to support the Established Church." 1 J. CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 353 (1873). Coke's early views—his opinion of the Puritan demands at Hampton Court (1604), the Commons' *Apology* of that same year, or even their Petition of 1610—are unknown. Apart from his resistance to Church demands for the co-ordinate jurisdiction of ecclesiastical and secular courts (which reflected a jealous regard for the common law rather than anti-Anglican sentiment), Coke seems to have expressed himself on religious issues only after 1621. In that year he strongly demanded the stricter enforcement of recusancy laws, a position he again took in 1625.

The question is whether anti-Papist, anti-Arminian fears unaccompanied by any (known) sympathy for Calvinism justify calling Coke a "Puritan." Many loyal Anglicans shared his fears; and on the basis of his denunciation of Dr. Montague in 1625 it would seem that Coke's main concern was Elizabethan in its political emphasis on state unity and security as opposed to theology. It should also be recalled that even in the debates leading to the

servative. Like many of his contemporaries, he disapproved of inferiors who sought to rise through the legal profession. At an assembly of benchers of the Inner Temple held in February of 1601 Coke, then Attorney General, ordered that "none hereafter shall be admitted into this House . . . but only such as shall be of good parentage and of no evil behaviour . . ."<sup>14</sup> Presumably, "good parentage" included country gentlemen, for at the time Coke himself was both getting rich and climbing the social ladder. In his private practice, he had acquired many lucrative retainers. He had married an heiress, and upon her death in 1598 he married another. Coke became so wealthy that in 1601 he was able to entertain Queen Elizabeth at Stoke Poges. When he died he left some 99 estates and, according to Samuel Thorne,<sup>15</sup> twice that number had passed through his hands.

To the extent that Coke was willing to engage in land speculation, he perhaps demonstrated a form of "capitalist spirit." But when it came to more modern undertakings in trade or industry, Coke showed remarkable scepticism. For one thing, he doubted the remunerative possibilities of manufacturing, so much of which was in the hands of monopolists. In his famous *Charge* to the Norwich Assizes delivered in 1607, Coke expressed his dislike of the monopolist and further observed that he

for the most part useth at a deare rate to pay for his foolishnes: For some of that profession have bene so wise, to sell twentie, thirtie, or perhaps fortie pound land a yeare, and bestow most part of the money in purchasing of a Monopolie: Thereby to anoy and hinder the whole Publicke Weale for his owne privat benefit: In which course he so well thriveth, as that by toyling some short time, either in *Starch*, *Vineger*, or *Aquavitae*, he doth in the end thereby purchase to himselfe an absolute beggerie, and for my owne part, their purposes and practices considered, I can wish unto them no better happinesse.<sup>16</sup>

Nor did Coke have any confidence in trading concerns. Though an honorary member of the Spanish Company<sup>17</sup> and, in his capacity as

Petition of Right in 1628 Coke's great contribution was political and not religious. H. HULME, *THE LIFE OF SIR JOHN ELIOT* 186-93 (1957). Coke was in no sense obsessed by religious questions. He was not devout in his personal life but continued his nominal allegiance to the Anglican Church.

14. 1 A CALENDAR OF THE INNER TEMPLE RECORDS 439 (F. Inderwick ed. 1896).

15. Thorne, *Tudor Social Transformation and Legal Change*, 26 N.Y.U.L. REV. 10, 13 (1951).

16. THE LORD COKE, HIS SPEECH AND CHARGE, at Hb (1607). The speech was piratically published by one Robert Prickett with, according to Coke, many errors and omissions. *Preface* to 7 Co. Rep.

17. He seems to have been admitted in return for helping draft the Company's charter of 1604. A. FRIS, *ALDERMAN COCKAYNE'S PROJECT* 157, 158 (1917).

Attorney General, one of the draftsmen of the charter of the Virginia Company,<sup>18</sup> he seems to have invested in neither.<sup>19</sup> He had been in his 30's when the trade depression following 1586 set in,<sup>20</sup> old enough to appreciate the precariousness of commerce and to confirm his habit of investing in land.

In this habit, Coke distinguished himself from many of his legal colleagues. Perhaps because so much of their practice was in London, there seems to have been great temptation for them to invest in the trading companies which were likewise centered there. Oliver St. John was involved in the Providence Island Scheme;<sup>21</sup> Sir Edwin Sandys, Sir Thomas Roe, John Selden and Sir John Popham all had connections with the Virginia Company.<sup>22</sup> All were or became staunch opponents of monopolies, at least the monopolies of others. As early as 1607, Coke had come to share their views, but apparently not their economic interests.

Even in his strictly legal capacity, Coke was not particularly sensitive to commercial needs. Despite the increasing interest in problems of joint-stock ownership, negotiable instruments, commercial contracts, debt and insurance, he devoted no special attention to them in his writings. The first of his *Institutes* dealt with land tenure, the second with various statutes, the third with criminal law, and the fourth with the jurisdiction of different courts. Taken together,<sup>23</sup> the *Institutes* come to over two thousand pages, only one of which treats of bankruptcy and only one of forfeiture. Commercial contracts as such are not even mentioned.

It might be objected that Coke set out to elucidate the laws of England, and that with the exception of the usury and bankruptcy statutes, these laws did not relate to business needs. But in the *Institutes* the descriptive and the prescriptive were joined. Had Coke wanted to make a point of commercial problems, he might easily have done so. His colleagues may also have lacked foresight and failed to distinguish

18. F. MATTLAND, *ENGLISH LAW AND THE RENAISSANCE* 31 (1901).

19. I am very much indebted to Professor Theodore K. Rabb of Harvard University for assistance on this point.

20. According to Lawrence Stone, the conclusions of W. R. Scott as to the decay of trade at this time must still be considered valid. See Stone, *State Control in Sixteenth-Century England*, 17 *ECON. HIST. REV.* 103, 108 (1947).

21. J. HEXTER, *THE REIGN OF KING PYM 77-84* (1941). Throughout chapter four, the familial and financial ties of many important Puritans are explained.

22. C. BEDWELL, *A BRIEF HISTORY OF THE MIDDLE TEMPLE* 41-48 (1909).

23. The first part of the *Institutes of the Laws of England* was published in 1628, the second in 1642, the third and fourth in 1644. [The parts of work are hereinafter cited as 1-4 INST., to the pagination of the original editions.]

between business and municipal corporations<sup>24</sup> or between negotiable instruments and promissory notes,<sup>25</sup> but this simply indicates that Coke was no more modern in outlook than they. When legal historians speak of Coke as a "transitional" figure attempting to adapt old common law forms to modern needs, they are referring primarily to his treatment of land tenure.

Those who go further do so on the basis of cases which Coke did not decide.<sup>26</sup> He has been credited, for example, with the decision in *Slade's Case*<sup>27</sup> which facilitated the enforcement of contracts. Until the mid-sixteenth century, claims for liquidated damages had to be sued under a writ of debt. The procedure hampered recovery, since it permitted a wager of law<sup>28</sup> and demanded greatly detailed pleading. Plaintiffs much preferred the action of assumpsit, which was allowed by courts only if the defendant had expressly promised to repay his debt. *Slade's Case* held that the mere existence of a debt implied a promise to repay and that this implication sufficed to ground an action in assumpsit. The decision marked an advance in the adaptation of old common law forms to commercial convenience. But Coke was not responsible for it. In 1602 he was Attorney General, not Chief Justice of the King's Bench.

When appointed to the bench, Coke did have an opportunity further to adapt the law to commercial changes. The courts were in great need of general principles to help determine the validity of consideration given to the defendant in cases arising from a writ of assumpsit. The formulation of such principles would have avoided a series of narrow or absurd decisions and aided the judicial enforcement of contracts. But Coke accepted the existing analytical framework, deficient as it was.<sup>29</sup> At times, through his penchant for historic technicalities or

24. Williston, *The History of the Law of Business Corporations before 1800*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 195, 204 (1909).

25. Inland bills of exchange apparently were not in common use until at least the 1650's. Cranch, *Promissory Notes Before and After Lord Holt*, *id.* at 72, 79.

26. They assume that merely because Coke reported a case he helped arrive at its decision. This must have been Fifoot's assumption when he credited Coke with the decision in *Slade's Case*. See C. FIFOOT, *THE ENGLISH LAW AND ITS BACKGROUND* (1932). But Coke began taking notes on cases he heard argued from the time of his call to the bar (1578) and began publishing them in 1600, long before he was raised to the bench. Most of the cases reported were decided by other justices. And although Coke elaborated upon the decisions he reported, only at times did he indicate his approval by calling the reader's attention to their importance either in his comments "To the Reader" or within the cases themselves. The existence of such clear affirmation would seem to be essential, therefore, when ascribing to Coke the views embodied in cases he did not decide. He may have accepted the decisions in all cases as law, but this does not mean that he himself would have arrived at the same conclusion.

27. 4 Co. Rep. 91, 76 Eng. Rep. 1072 (K.B. 1602).

28. Thorne, *supra* note 15, at 19-20. If neighbors (usually twelve) swore on behalf of the defendant, the plaintiff could not succeed.

29. On the need for formulating general principles see C. FIFOOT, *supra* note 26, at 150,

through inadvertence,<sup>30</sup> he even thwarted the needs of commerce. In 1612, for example, he still insisted that the validity of incorporations depended upon the correct stipulation of name and place in the letters patent.<sup>31</sup>

Indeed, the common law possessed no fund of commercial wisdom. Commercial law was a distinct and separate body because medieval merchants had demanded a more expeditious treatment of their problems than the common law courts provided. They used the staple courts, courts of fairs and boroughs.<sup>32</sup> After the decay of these courts in the sixteenth century, they turned to the Admiralty and to other courts of equity whose procedure was not burdened by rigid forms of action and whose decisions were based on customary trade usages compiled in the law merchant.<sup>33</sup> This provoked a reaction among defenders of the common law and led to attempts to arrogate the jurisdiction of the courts of equity. Competition with Chancery had brought about the improvements in the action of assumpsit mentioned before.<sup>34</sup> But merchants seem to have thought these improvements in common law forms insufficient. Both the Chancery and the Admiralty survived the Civil Wars even though they were prerogative courts.

That they survived was due to no support from Coke, for he continued the earlier attempts to arrogate equity jurisdiction to the common law. His attacks on Chancery are notorious, but at least he enjoyed the support of those who, like Selden, believed that "equity is a roguish thing."<sup>35</sup> When he persisted in attacking the Admiralty, however, Coke stood alone. Not since 1575 had the common lawyers challenged this court whose jurisdiction Queen Elizabeth had upheld in cases arising upon the seas, in foreign ports and even at home if the dispute involved denizen and foreign merchants.<sup>36</sup> Coke deliberately misconstrued her

which seems to be the clearest account of early contract law. Coke's failure to think beyond his contemporaries may be seen in *Mallory v. Lane*, Cro. Jac. 342, 79 Eng. Rep. 292 (Ex. 1614), and *Therne v. Fuller*, Cro. Jac. 396, 78 Eng. Rep. 338 (K.B. 1615).

30. Coke reported the dictum in *Pinnel's Case*, 5 Co. Rep. 117, 77 Eng. Rep. 237 (C.P. 1602), in a manner that made it seem, on anything but the most careful reading, a rule of law, thus enabling courts in the late nineteenth century and even now to insist that partial payment of a debt was no consideration for a promise to forego the balance, but that the offer of something different, however disproportionate in value, would suffice.

31. See Coke's report of *The Case of Sutton's Hospital*, 10 Co. Rep. 23, 77 Eng. Rep. 960 (K.B. 1612).

32. 4 INST. \*237; C. FIFOOT, *supra* note 26, at 104.

33. Burdick, *Contributions of the Law Merchant to the Common Law*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 34, 35-39 (1909).

34. *Id.* 41.

35. Quoted in Tudsbury, *The Law Merchant and the Common Law*, 24 L.Q. REV. 392, 400 (1918).

36. W. PRYNNE, BRIEF ANIMADVERSIONS ON, AMENDMENTS OF, AND ADDITIONAL EXPLANATORY RECORDS TO THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING THE JURISDICTION OF COURTS 99 (1669).

settlement and in 1610 he sought to stay the Admiralty's proceedings. He invented a transparent legal fiction to the effect that contracts between merchants, denizen and foreign, were made in the English port regardless of where they were actually made,<sup>37</sup> and then asserted common law jurisdiction over all cases involving merchants which arose in England. The Fourth Part of his *Institutes*, published posthumously, contained a bitter attack on the Admiralty.<sup>38</sup>

This attack evoked equally bitter responses from spokesmen for the mercantile interest.<sup>39</sup> Godolphin, Zouch, and Prynne<sup>40</sup> all defended the jurisdiction of the Court of Admiralty. Support for this court was so great that it was not until after the Restoration that the common law obtained a monopoly of commercial litigation.<sup>41</sup> At that time, the common law courts were compelled to adopt the rules of the law merchant for lack of any adequate precedent of their own.<sup>42</sup> Nothing necessitated this incorporation except jurisdictional rivalry. In the long run merchants gained little; in the short run, they suffered great inconveniences, inconveniences which did not at all trouble Sir Edward Coke. He believed, no doubt, that politically the defence of the common law was in the interest of the merchants since they shared many grievances against the Crown.<sup>43</sup> Yet when the interests of the merchants and the common law courts diverged, he favored the courts and with no apparent hesitation.

## II.

Coke resembled the Puritan merchants in neither his priorities nor his interests and background. Nor did he share their alleged predilection for *laissez-faire*. In Commons he supported many statutes of

37. *Id.* 95-98.

38. 4 INST. \*134-47.

39. For a detailed discussion of the Admiralty Court, see Brian Levack's unpublished study, Department of History, Yale University.

40. See generally J. GODOPHIN, A VIEW OF THE ADMIRAL JURISDICTION (1661); R. ZOUCH, JURISDICTION OF THE ADMIRALTY (1669); and W. PRYNNE, *supra* note 36. In stressing the distinction between the law merchant and the common law and the need of merchants for speedy, certain remedies, Prynne quoted Selden's *Mare Clausum* (*The Right and Dominion of the Sea*), which appeared in 1618. W. PRYNNE, *supra* note 36, at 94-95. This is not to say that the remedies afforded by the Admiralty were ideal. They were not, and occasional complaints such as that of Sir Arthur Ingram could be heard. The point here is that the Admiralty provided the best legal assistance to merchants available in seventeenth-century England.

41. 5 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 143 (1924).

42. Tudsbery, *supra* note 35, at 398-400.

43. Coke also shared many grievances with the Puritans, grievances which were coincidental. See generally J. EUSDEN, PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH-CENTURY ENGLAND (1958).



"mercantilist" nature; on the bench he construed all such statutes in accordance with the rules of his day. Coke's decisions may have been narrow, but not because he sought deliberately to weaken judicial enforcement of regulatory legislation. Unlike economic liberals, he had no wish to dismantle the paternal structure of the sixteenth and seventeenth centuries. From Lord Burghley,<sup>44</sup> Coke had acquired a profound admiration for Tudor legislation, an admiration which survived even his break with the following (Stuart) Court.

That break occurred in 1621, shortly after the general election in which Coke was returned to Parliament.<sup>45</sup> A serious trade crisis then existed, so much of the debate concerned proposals to repair the economy. Coke's advice was frequently sought, and he now was under no constraint to endorse the official policy of regulation. Indeed, his personal pique at having been by-passed in the selection of a new Lord Chancellor might easily have inspired an indiscriminate opposition to any policy proposed by the King. Coke's political views had altered markedly as a consequence of his new allegiance to Parliament. Whereas he had previously accorded the Crown a wide range of discretionary authority to regulate customs duties by proclamation<sup>46</sup> and to order impositions,<sup>47</sup> Coke now denied such prerogatives. But no new thoughts on economic policy accompanied his redefinition of royal authority. Coke conceded to Parliament those powers he denied to the Crown.

Certainly, his approach to foreign commerce was free of *laissez-faire*

44. C. READ, *LORD BURGHLEY AND QUEEN ELIZABETH* 586 n.26 (1960). Because Lord Burghley (William Cecil) was in some sense the architect of Tudor paternalism, his association with Coke is of special importance.

45. Many historians date Coke's break from June 30, 1616 when he was sequestered from the Council Table and forbidden to ride summer circuit as a Justice of Assize. *ACTS OF THE PRIVY COUNCIL OF ENGLAND, 1615-1616*, at 649 (1925). In that year, he was called before the Council to explain his *Reports* and on November 16 he was removed from his position as Chief Justice of the King's Bench. Nevertheless, Coke himself seems not to have regarded the events of 1616 as marking an irrevocable breach with James. He thought of nothing but recovering himself from disgrace and immediately began making arrangements for the marriage of his daughter to Sir John Villiers, the older brother of the Duke of Buckingham. The marriage arranged, Coke was restored to the Privy Council on April 1, 1617. *ACTS OF THE PRIVY COUNCIL OF ENGLAND, 1616-17*, at 216 (1927). In 1621 he was listed as one of the Privy Councillors in the House of Commons and when Parliament opened, James expected him to cooperate with the Court Party. See D. WILLSON, *supra* note 4, at 89. The final break came in 1621, after the election and after Coke was by-passed in the selection of a new Lord Chancellor.

46. 276 *STATE PAPERS DOMESTIC, ELIZABETH, 1598-1601*, at 521.

47. Coke supported the decision in *Bate's Case* in 1606, but said nothing to the effect that the King's discretion was unconfined. 278 *STATE PAPERS DOMESTIC, CHARLES I, 1634*, at 351. For another issue on which Coke altered his views, see 5 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 450 (1924), and note that this eminent historian believed that although Coke departed from certain of his former political opinions, "his outlook was always that of a statesman of the latter part of the Tudor period." *Id.* 456.

notions.<sup>48</sup> At the beginning of the session in 1621, Sir Edwin Sandys, reporting for the Committee Concerning the Decay of Trade of which he was chairman, listed scarcity of coin as the chief cause of the trade depression.<sup>49</sup> Coke agreed with his diagnosis and enumerated seven reasons for the scarcity.<sup>50</sup> Included in his analysis were the license of the East India Company to transport bullion, the unfavorable balance of trade, and the nature of the trade that was pursued. Displaying a medieval attitude towards luxury, Coke complained that too much commerce with France dealt in "wines and lace, and such like trifles." Tobacco too, was considered a luxury and as Sandys noted,<sup>51</sup> most of England's trade with Spain was absorbed by the importation of tobacco. Why not, he suggested, forbid the expenditure of so much money abroad by compelling the purchase of tobacco from the colonies. As a shareholder in the Virginia Company, Sandys naturally wished to create a monopoly for that Company and also suggested that the growth of tobacco in England be proscribed.<sup>52</sup> Coke thought that the growing of tobacco at home would help the farmers,<sup>53</sup> but he did go along with the proposal to forbid the import of Spanish tobacco.<sup>54</sup>

His greatest concern, however, was with England's staple commodity, cloth. In the early part of the seventeenth century, the production of finished cloth had declined and it was widely thought that this decline was related to the practice of exporting unfinished cloth and importing finished cloth. Since the reign of Edward III, the Crown had attempted to eliminate this practice and to encourage the domestic industry by prohibiting the import of all cloth.<sup>55</sup> Elizabeth too, sought to enforce

48. Coke's protectionist bias was revealed many more times than suggested above. He requested, for example, stronger penalties against the export of iron and copper and prayed that timber too might not be transported. 3 INSR. \*97. The export of these metals, necessary for England's defence and economic self-sufficiency, had previously been prohibited. See Statute of Staples, 27 Edw. 3, c. 3 (1353); 33 Hen. 8, c. 7 (1541); 2 & 3 Edw. 6, c. 37 (1548). Thus, by upholding the existing statutes, Coke was upholding traditional tenets of economic policy. And even when he appeared to endorse free trade, Coke invoked very traditional arguments. On May 17, 1621, when a bill was introduced "to prohibit the importation of corn," he opposed it saying: "If we bar the importation of corn when it aboundeth, we shall not have it imported when we lack it. I never yet heard that a bill was ever before preferred in Parliament against the importation of corn, and I love to follow ancient precedents," 1 J. CAMPBELL, *supra* note 13, at 322. The export of corn had been prohibited because Tudor statesmen wished to guarantee an adequate food supply at home. To prohibit the import of corn would have endangered that supply so Coke opposed the bill.

49. 1 PARLIAMENTARY HISTORY 1196-97 (March 1, 1621).

50. *Id.* 1195 (Feb. 26, 1621).

51. *Id.* 1196 (Feb. 27, 1621).

52. 3 COMMONS DEBATES, 1621, at 8 (W. Notestein, F. Relf & H. Simpson eds. 1935).

53. *Id.*

54. 1 JOURNALS OF THE HOUSE OF COMMONS 581 (April 18, 1621).

55. 11 Edw. 3, c. 3 (1337).

this policy, but like her predecessors, she was compelled to abandon it for want of adequate domestic dyeing and finishing skill. As an alternative policy, she set about encouraging the export of finished cloth<sup>56</sup> and extended the privileges of the great trading companies. The most important of these was the Merchant Adventurers Company, to which she granted the exclusive right to export to Upper Germany and France as well as to the Low Countries.<sup>57</sup> Because of the concentration of its trade in London, its exclusive admission policies, its high prices and its practice of "cloth stretching," the Company became most unpopular. Sir Edward decried these practices.<sup>58</sup> But above all, he objected to the export of unfinished cloth.<sup>59</sup>

In the hope of aiding the unemployed clothiers and of increasing the revenue of the State by eliminating the need to import finished cloth,<sup>60</sup> Coke went so far as to embrace the ill-starred project of Alderman Cockayne, who found a new company to export only finished cloth.<sup>61</sup> The project ended in disaster, with other nations retaliating by prohibiting the import of English cloth. By that time Coke had withdrawn his support because of the nature of the Company.<sup>62</sup> But he persisted in his aim of encouraging home industry. In 1621, when the Shrewsbury drapers' local monopoly of the Welsh cloth trade was thrown open, Coke helped insure that their cloth had to be finished before being sold.<sup>63</sup> And in 1624, he advised that the export of wool be made a felony.<sup>64</sup> Sir Edward was not averse to the regulation of foreign trade. He only insisted that Parliament do the regulating.<sup>65</sup>

56. 8 Eliz. 1, c. 6 (1565).

57. C. LUCAS, *THE BEGINNINGS OF ENGLISH OVERSEAS ENTERPRISE* 79 (1917). This was the Charter of 1564.

58. A. FRUIS, *supra* note 17, at 244.

59. See Coke's memorandum of December 18, 1613 in *Sir Julius Caesar's Notes from the Privy Council Meetings Relating to Alderman Cockayne's Project*, *id.*, app. D, at 458. Throughout his writings, Coke made many references to the virtue of encouraging home industry either by prohibiting the import of clothes finished abroad or the export of unfinished English cloth. 2 INST. \*41.

60. These were the same arguments used by Cockayne on behalf of his project. 3 E. LIPSON, *supra* note 6, at 374-75.

61. Only three of James's Privy Councillors supported his decision to endorse the project and the most enthusiastic among them was Coke. A FRUIS, *supra* note 17, at 26. According to this account, Coke endorsed the project for opportunistic reasons and was made a councillor as a token of James's gratitude. But Coke's position here was perfectly consistent with the views he expressed after breaking with the Court and besides, Coke withdrew his support of the project in January, 1616, when he was neither resigned nor determined to lose favor.

62. *Id.* 467; 86 STATE PAPERS DOMESTIC, JAMES I, 1615-1616, at 358 (March 27, 1616).

63. T. MENDENHALL, *THE SHREWSBURY DRAPERS AND THE WELSH WOOL TRADE IN THE XVI AND XVII CENTURIES* 176 (1953).

64. 1 JOURNALS OF THE HOUSE OF COMMONS 678 (March 6, 1623).

65. "That no Commodity can be banished, but by Act of Parliament." 1 JOURNAL OF THE HOUSE OF COMMONS 581 (April 18, 1621). See also 3 INST. \*181-85.

This constitutional issue of who was to do the regulating never arose with regard to domestic trade: Tudor monarchs had judiciously requested parliamentary sanction for their economic policies. They received such sanction because of the consensus regarding the need to maintain full employment, a proper wage and price structure, a sufficient amount of land under tillage and fair trade practices. Tranquillity, too, was an accepted goal of economic policy<sup>66</sup> because the Tudors assumed a conflict among private interests and the need artificially to maintain harmony.<sup>67</sup> In the sixteenth century, England had only just recovered from years of internecine strife and lacked the policy system necessary to quell food and land riots. The enforcement agents were informers,<sup>68</sup> Justices of the Peace and Councillors, whose inefficiency made essential the prevention of unrest. Prevention and paternalism went hand in hand with a multitude of regulations designed to remove potential grievances. According to Tudor habits of thought, to challenge these regulations would be to challenge the entire underpinning of the social fabric.

This is precisely what advocates of the *laissez-faire* thesis suggest Coke hoped to do, a contention which must be examined in detail. Take, for example, Coke's attitude toward the enclosure laws which prohibited the conversion of farm land to pasturage. In 1607, he proceeded against rioters who had tried to force down enclosures.<sup>69</sup> But Coke seems to have recognised the validity of the protest and, two years later, led a commission "towards reforming depopulation, converting tillage into pasturage, and preventing decay of husbandry."<sup>70</sup> At that time he was still a Crown servant. Yet even in 1624 he believed that the Tudor enactments which applied to the 25 midland counties most affected by the conversion of land should remain in force.<sup>71</sup> Enclosure by agreement might be all right, provided it did not lead to depopula-

66. Fear of disorder helps to explain Star Chamber jurisdiction over semi-criminal problems not covered by common law courts, e.g., prices, trade control and enclosures. A. POLLARD, *WOLSEY* 77 (1929).

67. The body politic ideal so much admired in Coke's day ought properly to have led to an assumption of harmony among private interests and also among private and public. Yet as so often happens, the self-image of the Tudors was basically prescriptive. When it came to legislating or pointing out wrongs, Coke and his contemporaries fully recognized the gap between theory and practice and it was perhaps that recognition which allowed for movement in a society whose ideal was static.

68. On the importance of informers see Beresford, *The Common Informer, the Penal Statutes and Economic Regulation*, 10 *ECON. HIST. REV.* (2d ser.) 221 (1957).

69. 28 *STATE PAPERS DOMESTIC*, JAMES I, 1603-1610, at 373 (Sept. 1607).

70. *Id.* 541 (Sept. 2, 1609).

71. See 3 *INST.* \*204; Beresford, *Habitation vs. Improvement: The Debate on Enclosure by Agreement*, in *ESSAYS ON THE ECONOMIC AND SOCIAL HISTORY OF TUDOR AND STUART ENGLAND* 40-66 (F. Fisher ed. 1961).

tion and did not involve the conversion to pasturage. "Agriculture or Tillage," Coke wrote, "is of great account in Law, as being very profitable for the Commonwealth. . . ."<sup>72</sup>

So great was the fear of food shortage that the Tudors sought to encourage husbandry by artificially supporting the price of corn<sup>73</sup> as well as by prohibiting the conversion of arable land. At the same time, they frowned on individual attempts to raise prices for the sake of private gain. Regulation was to be national and it was to provide for the common good. The "Preamble" to a statute enacted in 1552 decried, for example, the increase in the price of goods necessary for men's subsistence due to the practices of those who minded "only their own lure without respect of the Commonwealth, to the great damage, impoverishing and disquieting of his majesty's subjects."<sup>74</sup> That was the "Preamble" to the great declaratory act against forestalling and the related offences of regrating and engrossing: the purchase of merchandise, victuals and other commodities on their way to market for the purpose of restricting supply, the reselling of commodities brought to and purchased in the same market at a higher price, and the purchase of corn or grain, butter or cheese, fish or other dead victuals with the intent of reselling. Statutes prohibiting these crimes, as they were considered, date back to the thirteenth century and were passed periodically until late in the eighteenth.<sup>75</sup> Usually, they were enacted in

72. 1 Inst. \*85b. Coke's concern for tillage and also tenurial rights probably explains why he reported *Tyrringham's Case*, 4 Co. Rep. 36b, 76 Eng. Rep. 973 (K.B. 1584), so favorably. The plaintiff in the case was a farmer of a landlord in Northamptonshire who had purchased a house, land and part of the meadow and commons belonging to a neighboring estate. Prior to the sale, that part of the commons had been used by the tenant of the original landlord for pasturage, but the new landlord forbade the tenant to graze his cattle. When the tenant chased out the cattle of the new landlord's farmer, the farmer brought an action for trespass. The case was very complicated because the defendant needed pasture land to graze the cattle he used to till his land. The question confronting the King's Bench, therefore, was whether as a condition of his socage tenure, the pasturage was appurtenant to his husbandry. A long dictum followed the court's decision in favour of the defendant as to the benefit of maintaining land in tillage. In the court's words, or better, in Coke's, "the common law prefers arable land before all other." If the defendant were forbidden to use the commons, he would be forced to convert land now used for tillage into pasture. Parliament had made excellent statutes to keep up the price of corn and thereby to encourage husbandry, but these would be ineffectual if men were compelled to convert arable land. It is reasonable to attribute these views to Coke even though he did not decide the case, because in his "Comment to the Reader" Coke explained how important and wise a decision he thought it was and obviously interpolated his own policy considerations within the text of his report.

73. See note 72 *supra*. For an opposite view of Tudor policy see Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 367-68 (1954), where Letwin suggests that low prices were the object of laws against forestalling and engrossing. What he seems to forget is that these became statutory offenses in times of scarcity when prices were already high and the object was to prevent famine and profiteering.

74. 5 & 6 Edw. 6, c. 14 (1552).

75. In 1772, the statute of Edward VI was repealed by 12 Geo. 3, C. 71, but badgers,

times of great scarcity<sup>76</sup> and then remained in force after the immediate crisis. The offenses they defined were already indictable at common law, but the statutes also assigned punishments to be enforced by the courts.

Coke's first experience with the statutes against forestalling and engrossing seems to have come in 1598, when he was Attorney General. In that year, he attended a conference of all the justices, who decided that any "merchant, subject, or stranger, bringing victuals or merchandize into this realme, may sell them in grosse: but that vendee cannot sell them againe in grosse, for then he is an ingrosser . . . and may be indicted thereof at the common law, as for an offence that is *malum in se*."<sup>77</sup> At first appearance, Coke and the justices were making an exception for foreign traders and restricting the purview of the Statute of 1552. Yet that Statute specifically excluded persons transporting "things imported from beyond the seas," and this exception was upheld by 13 Eliz. 1, c.25. Parliament had recognised that the initial sale by importers could be in gross and sought only to proscribe intermediate sales among middlemen.

If Parliament's intent was clear on this question, it was not too obvious which items were to be subsumed under the general category of "victuals." Certain commodities such as corn were mentioned specifically, but the statute of 1552 made no attempt to enumerate all "victuals." Instead it was left to the courts to determine. Their guideline was the "Preamble" to the statute, which stressed goods necessary for subsistence. Salt clearly fell into that category,<sup>78</sup> but fruit did not. At least that is what Coke and the other justices resolved in *Baron v. Boys*.<sup>79</sup> The Exchequer had already excepted fruit,<sup>80</sup> so Coke and his colleagues were in no way departing from precedent. Nor were they revealing an "aversion" to the statute. Coke himself tried at least four cases involving forestallers and engrossers. One he dismissed on technical

engrossers, forestallers and regrators remained indictable at common law. Only in 1844 with the enactment of 7 & 8 Vict., c. 24, were the offenses of forestalling, regrating and engrossing entirely abolished. W. SANDERSON, *RESTRAINT OF TRADE IN ENGLISH LAW* 97-98 (1926).

76. For a good summary of the laws against forestalling, see Jones, *Historical Development of the Law of Business Competition*, 35 *YALE L.J.* 905, 906-20 (1926).

77. 3 *INST.* \*196. An offence that was *malum in se* was against the law of nature or the law of God and thus even the King could not dispense with a statute proscribing such an evil. Birdsall, *Non Obstante—A Study of the Dispensing Power of English Kings*, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCLILWAIN* 56 (1936).

78. 3 *INST.* \*195-96.

79. 13 *Co. Rep.* 18, 77 *Eng. Rep.* 1429 (Ex. 1608).

80. *Braddon v. Bowen*, *Cro. Jac.* 214, 79 *Eng. Rep.* 187 (Ex. 1608).

grounds,<sup>81</sup> the other three he decided against the defendants.<sup>82</sup> In the Third Part of his *Institutes*<sup>83</sup> Coke devoted a chapter to explaining the laws and seems fully to have approved of them.

Coke appears to have been similarly sympathetic to the single most extensive regulatory enactment of the period. Passed in 1563, the Statute of Artificers<sup>84</sup> regulated entrance into given trades, provided full employment to craftsmen, and guaranteed the quality of the skill. It sought to "banish idleness, advance husbandry, and yield unto the hired person, both in time of scarcity, and in the time of plenty, a convenient proportion of wages."<sup>85</sup> Justices of the Peace were empowered to fix wages and for the first time a national apprenticeship requirement was imposed.<sup>86</sup> Regulations were so detailed that any one at all inclined toward "free trade" would have found them intolerable.

But Coke fully endorsed the Statute of Artificers. As Chief Justice of the Common Pleas, he was expected to deliver a charge to the assizes at the beginning of each term of the law courts and to draw up a list of articles for presentment. Whether his list differed from his predecessor's is difficult to say.<sup>87</sup> But at Norwich he asked that the constables of each hundred see that "All masters be presented that . . . give greater wages than shall be set down by the justices of the peace" and that they "inquire into and present masters who turn away servants before the time for which retained, for that thereby many become rogues and idle persons."<sup>88</sup> That was in 1607. In the 1630's, he still believed that the many statutes made for the "punishment of riots, unlawful assemblies, . . . excessive taking of wages contrary to the

81. *King & Goldesborow v. Whider*, 2 Bulst. 317, 80 Eng. Rep. 1152 (K.B. 1614). For the difficulty common informers encountered in trying to produce admissible evidence, see Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 763 n.13 (1955).

82. *Suckerman & Coates v. Warner*, 2 Bulst. 248, 80 Eng. Rep. 1097 (K.B. 1614); *R. v. Davies*, 1 Rolle 11, 81 Eng. Rep. 291 (K.B. 1614); *R. v. Wray*, 1 Rolle 194, 81 Eng. Rep. 426 (K.B. 1615). See generally W. ILLINGWORTH, *AN INQUIRY INTO THE LAW'S, ANCIENT AND MODERN, RESPECTING FORESTALLING, REGRATING AND INGROSSING* (1800).

83. 3 INST. \*194-97.

84. 5 Eliz. 1, c. 4 (1562).

85. *Id.*, preamble.

86. The apprenticeship clauses were not part of the original bill; they were added through the initiative of the Commons. For new insight into the formulation of the Statute see S. BINDOFF, *THE MAKING OF THE STATUTE OF ARTIFICERS, ELIZABETHAN GOVERNMENT AND SOCIETY*, especially at 68-79 (1961). Until 1563 apprenticeship regulation had been left to gild towns, whose assistance in enforcing the new statute was still required by the administrative weaknesses of the Tudor state. But the Statute of Artificers did mark a decisive step towards national uniformity and control, and indeed most of Coke's criticism of guilds was directed against ordinances which were either more stringent than the new Statute or which conflicted with other of the newly formulated national policies.

87. M. DAVIES, *THE ENFORCEMENT OF ENGLISH APPRENTICESHIP, 1563-1642*, at 232 (1956).

88. THE LORD COKE, *HIS SPEECH AND CHARGE* (1607); 276 STATE PAPERS DOMESTIC, ELIZABETH, 1598-1601, at 519.

statutes of labourers and artificers" were "good statutes" whose lack of enforcement was to the "great let of the common law, and wealth of this land . . . ." <sup>89</sup>

Coke's performance on the bench, however, is more controversial. Prior to the Restoration, there were very few cases in which the question of apprenticeship even arose. Coke decided two of them while Chief Justice of the King's Bench. The more famous was *The Taylors of Ipswich Case*<sup>90</sup> which involved the relationship between a gild ordinance and the Statute of Artificers. The Merchant Taylors had required that their permission be obtained to exercise a trade after the prospective craftsmen had completed their apprenticeship. The defendant, a private tailor to a "freeman of Ipswich," refused to clear with the society, which then brought suit. Coke found that the Statute did not apply to domestic servants, but this was no more than a dictum. The defendant had in fact been properly apprenticed. Coke never addressed himself to the validity of the apprenticeship regulations because the point in issue was whether or not the Merchant Taylors might compel fully apprenticed craftsmen to obtain their permission to practice their trade. The Taylors' charter granted them the right to pass by-laws so that the question was the validity of the particular ordinance.<sup>91</sup>

Coke decided that it was not valid because the Merchant Taylors' ordinance tended to create a monopoly and violated the "liberty and freedom of the subject." This was after *The Case of Monopolies*<sup>92</sup> had been decided, and Coke had the solid weight of precedent behind him. Citing this case, he explained that the law forbade no man to exercise the trade for which he was qualified. Idleness was abhorred by the law because it was "the mother of all evil, . . . and especially in young men, who ought in their youth . . . to learn lawful sciences and trades, which are profitable to the Commonwealth."<sup>93</sup> What Coke objected to was not the statute but the possibility that a man qualified to work

89. 4 INST. \*40.

90. 11 Co. Rep. 53, 77 Eng. Rep. 1218 (K.B. 1614).

91. The "new monarchy" had asserted itself over chartered towns and other corporate bodies; The Ordinances of Corporations Act, 19 Hen. 7, c. 7 (1503), bestowed on judges the power to abrogate new gild ordinances made without their consent. See W. CUNNINGHAM, *THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE* 26 n.2 (1907). Most accounts fail to distinguish between Coke's censure of a particular ordinance and an institution itself. To censure the former may have signified a weakening of the power of corporate bodies but it was perfectly consistent with contemporary practice as suggested by the statute mentioned above. Significantly, Coke did not challenge the charters of properly incorporated bodies and generally reflected the Tudors' ambivalent attitude—their desire for national control but recognition of administrative problems which still gave great importance to pluralist groups.

92. 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602).

93. 11 Co. Rep. at 53b, 77 Eng. Rep. at 1219.



under the act might be prevented from doing so by a gild. Even Heckscher recognized the weakness of basing his estimate of Coke as a free trader on this case, and relied on Coke's narrow construction in the second of the two cases he decided.

That was *Tooley's* (or *Tolley's*) *Case*<sup>94</sup> in which the defendant, a Londoner, had taken up the work of an upholsterer after serving his apprenticeship as a wool packer. He was prosecuted by the Crown because the Statute of Artificers provided that a man must be apprenticed to the specific trade he practiced. The statute had not, however, enumerated the trades which came under its scope. Each section covered different trades and the section on apprenticeship was very vague: "None shall set up, occupy, use or exercise any craft, mystery or occupation, now used or occupied within the realm of *England* or *Wales*; except he shall have been brought up therein seven years at least as an apprentice."<sup>95</sup> In a dictum, Coke said the provision did not cover upholstering because it was neither a "trade nor a mystery and did not require any skill."

According to Heckscher,<sup>96</sup> this was the first time the courts had ever excluded a craft: Coke was using immoderate discretion to narrow the scope of the statute because he had an "aversion" to apprenticeship regulation. This interpretation would seem to be incorrect. The occupation of buying and selling had been excluded twice in different decisions.<sup>97</sup> More important, it had been excluded on the ground that it required no special skill, precisely the ground on which Coke excluded upholstering. He and the other justices<sup>98</sup> considered the maintenance of a certain standard of skill among craftsmen the basis for the apprenticeship rule; hence employments requiring no training seemed outside the scope of the Statute.

94. 2 Bulst. 186, 80 Eng. Rep. 1055 (K.B. 1613).

95. 5 Eliz. 1, c. 4, § 31 (1562).

96. 1 E. HECKSCHER, *MERCANTILISM* 292 (M. Shapiro trans. 1935).

97. In 1580 judgment was given in the Exchequer upon an information against a clothier, that the statutory "exercising a trade" was not applicable to the buying of unfinished cloth and its later sale by the buyer after being put out for finishing. In 1600 the occupation of costermonger was said to be exempt. These decisions are cited in M. DAVIES, *THE ENFORCEMENT OF ENGLISH APPRENTICESHIP* 241 (1956). Generally, the judicial interpretation of the Statute was far from being so uniformly unfavorable as has been supposed. Derry, *The Enforcement of a Seven Years' Apprenticeship under the Statute of Artificers*, in 4 *ABSTRACTS OF DISSERTATIONS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY FOR THE UNIVERSITY OF OXFORD* 10-11 (1931). Indeed, there is evidence to suggest that the Statute was still enforced at the end of the seventeenth century. Letwin, *supra* note 73, at 364-65.

98. And also other commentators on the statute. For although section xxiv explicitly mentioned manual occupations, within ten years after the statute passed, an unsigned "Memorandum" ascribed the apprenticeship regulation to the need to maintain skill as well as the need to restrict the number of artificers. The "Memorandum" is published in 1 *TUDOR ECONOMIC DOCUMENTS* 353-63 (R. H. Tawney & E. Power eds. 1924).

Even if Heckscher were correct and Coke was the first to construe a trade as being outside the statute, it would not at all follow that he opposed apprenticeship regulation. As Thorne has shown, the sixteenth century witnessed a general trend towards curtailment of judicial supplementation of statutes which had nothing to do with economic policy.<sup>99</sup> As the number and importance of statutory enactments increased, so too did the narrowness with which the courts interpreted the words of Parliament. A more modern awareness of legislative competence was leading the courts to restrict their discretion and apply the intention of the legislature. In the Statute of Artificers, as in the Statute against Foresters, Parliament's intention was stated in general terms and it was up to the courts to determine which trades fell within their scope. A negative decision with regard to a particular trade need not, therefore, imply any bias.

Coke's central concern in *Tooley's Case* was neither *laissez-faire* nor the unskilled nature of the upholstering trade. The issue of skill arose because it was in the indictment and because it constituted one of the arguments of the defense counsel. But the gravamen of the argument was the privilege of London.<sup>100</sup> The statute had stipulated that a man must be apprenticed to the specific trade he practiced. The custom of London permitted freemen who had been apprenticed to any trade to practice any other. London was an incorporated city, the validity of whose customs had been recognised by royal charter and confirmed by Parliament. Section 33 of the statute explicitly excluded the City from its scope. Coke found for Tooley because he was a Londoner, and not because Coke had an "aversion" to the statute.

### III.

On the basis of his attitude towards the three most important Tudor regulations, it can hardly be said that Coke departed from contemporary legal and economic opinion. He supported paternalistic measures,

99. See his brilliant *Introduction* to T. Egerton, *A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES* (Thorne ed. 1942). Holdsworth explains that in the Tudor-Stuart period, dismissals of prosecutions of all types of cases for seemingly minor inaccuracies in the indictment were frequent. 4 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 531 (1924).

100. Unlike civilian lawyers who opposed municipal corporations on the ground that they impugned the sovereignty of the state, Coke and the common lawyers usually defended the privileges of the City and other incorporated towns. See 2 *INSR.* \*20; *The Chamberlain of London's Case*, 5 Co. Rep. 62b, 79 Eng. Rep. 150 (K.B. 1590); *Clearywork v. Constable*, Cro. Eliz. 110, 78 Eng. Rep. 367 (K.B. 1588); *Waggoner v. Fish*, 2 Brownl. & Golds. 284, 123 Eng. Rep. 944 (C.P. 1610) (also reported as *The Case of the City of London*, 8 Co. Rep. 121b, 77 Eng. Rep. 658 (K.B. 1610)).

## Coke's "Economic Liberalism"

using his judicial authority to uphold their provisions and purposes. Advocates of the *laissez-faire* thesis were quite mistaken in suggesting a deliberate attempt to weaken enforcement of statutory regulations. And they were also mistaken in suggesting a deliberate distortion of precedent when dealing with cases of monopoly. According to Wagner,<sup>101</sup> Sir Edward undermined a tolerance of restrictive practices long established at common law; his economic liberalism led him to introduce novel anti-monopoly notions into his decisions. But Coke dealt fairly with precedent and insofar as he made any contribution to the legal underpinnings of capitalism, it was to modify the blanket proscription of all contracts in restraint of trade.

Since the fifteenth century, courts had refused to enforce contracts in which one party promised not to practice his trade.<sup>102</sup> In *Colgate v. Bacher*, which was decided two years before *The Case of Monopolies*, the King's Bench still found that "to prohibit or restrain any to use a lawful trade at any time, or at any place" is against public policy and unenforceable.<sup>103</sup> Coke was the first to modify this doctrine and he did so in *Rogers v. Parrey*.<sup>104</sup> The case involved the validity of a promise made by the defendant to the effect that in consideration of so much paid to him by the plaintiff, he would not exercise his trade as joiner in London for twenty-one years. The defendant had not abided by his promise and was being sued. Coke found for the plaintiff, thus upholding a contract made in restraint of trade.

Proponents of the *laissez-faire* thesis could have used the decision in *Rogers v. Parrey* to their advantage,<sup>105</sup> for the sanctity of contract and right to eliminate competition through voluntary agreement were vital aids in the growth of modern capitalism. Courts in the nineteenth cen-

101. See note 9 *supra*.

102. R. WILBERFORCE, A. CAMPBELL & N. ELLES, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* 39-55 and *passim* (1957) [hereinafter cited as WILBERFORCE].

103. Cro. Eliz. 872, 78 Eng. Rep. 1097 (K.B. 1601).

104. 2 Bulst. 136, 80 Eng. Rep. 1012 (K.B. 1613). The more decisive departure from precedent, however, was *Broad v. Jollyfe*, Cro. Jac. 596, 79 Eng. Rep. 509 (K.B. 1619).

105. But only to a certain extent—because Coke actually decided the case on the narrow basis of contract law, finding for the plaintiff on the sole ground that the consideration he had offered the defendant was sufficient. In the important conflicting precedent, *Dyer's Case*, Y.B. 2 Hen. 5, 5B (1414), the defendant's bond that he would not practice his trade was not enforced. But there was no consideration at all for Dyer's bond, and later cases and commentators have argued that the case is simply part of the early evolution of the doctrine of consideration. *Mitchell v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711) (Lord Macclesfield); Letwin, *supra* note 73, at 373-74. Besides, insofar as the case raised questions of policy, Coke agreed that a man cannot bind himself not to use his trade generally as Dyer had done for that would deprive him of his livelihood. The only reasonable restraint he might voluntarily accept was not to exercise his trade for "a time certain, and in a place certain," *Rogers v. Parrey*, 2 Bulst. 136, 80 Eng. Rep. 1012, 1013 (K.B. 1613).

tury<sup>106</sup> used Coke's reasoning to uphold contracts more restrictive than that in *Rogers v. Parrey*. Yet the decision was ignored by Wagner who wanted to demonstrate the radical implications of Coke's attack on monopolies and not Coke's contribution to the growth of modern trusts.

That Coke did attack some<sup>107</sup> monopolies is certain. Whether his attack necessarily represented a departure from precedent or whether the common law had an inherent bias against trade restraint has aroused great controversy. In the seventeenth century, "monopoly" meant both private acts of hoarding and exclusive trade privileges bestowed by the Crown.<sup>108</sup> No precise precedent existed for the second of these forms because it was not until 1601 that royal patents became actionable at common law.<sup>109</sup> Cases involving the Crown prerogative had previously come before the Star Chamber and Privy Council; only the popular and parliamentary outcry induced Elizabeth to concede common law jurisdiction. Private monopolies, however, had long been void<sup>110</sup> and centuries of case-law could be applied to royal monopolies. So too, could the broad policy of full employment: royal privileges were exclusive and prevented craftsmen in monopolized trades from working. Most important, Coke and other litigants could cite evidence of longstanding government antipathy to restrictive gild practices. Gild ordinances which fixed prices at extortionate levels or lowered quality or excluded an unreasonable proportion of applicants had nearly always been unlawful.<sup>111</sup>

106. See, e.g., *Mitchell v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711); *Maxim-Nordenfelt Ammunition Co. v. Nordenfelt*, [1894] A.C. 535.

107. For the very limited nature of Coke's attack, see pp. 1351-58 *infra*.

108. 6 OXFORD ENGLISH DICTIONARY 624 (1933).

109. See Elizabeth's "Golden Speech," delivered on November 20, 1601, in Price, *supra* note 5, app. K. Wagner thought the absence of precise precedent indicated previous common law acquiescence in monopolies and therefore deduced a departure in policy from *The Case of Monopolies*.

110. See p. 1345 *infra*.

111. For complaints against restrictive gild practices, see Jones, *Historical Development of the Law of Business Competition*, 35 YALE L.J. 906, 922-30 (1926), and Kellet, *The Breakdown of Gild and Corporation Control over the Handicraft and Retail Trade in London*, 10 ECON. HIST. REV. (2d Ser.) 381-83 (1958).

William L. Letwin, perhaps the ablest proponent of the view that the common law effected a *volte face* in order to void trade restraints in the seventeenth century, cited only one example of prior acquiescence in "unfree" trade: *The Case of the Archbishop of York*, in which a court upheld the custom of the Archbishop's manor at Ripon that no one should operate a dyeing house there without the Archbishop's license. See Letwin, *supra* note 73, at 373. But this case involved rights attached to a manor bestowed by the King and to have decided otherwise would have meant challenging the Crown's prerogative and the Archbishop's privilege. Thus the decision testifies more to the state of political opinion in medieval England and to the power of the Church than to the common law attitude towards trade restriction.

In fact, by the fourteenth century, English courts were already invalidating gild ordinances, apparently on the basis of early statutes. Examples of early decisions against particular gild ordinances may be found in Jones, *supra*, at 928. Statutes prohibiting agree-

Decisions involving gild restraints provided excellent precedent by which to void monopolies, even though the common law had never been granted jurisdiction over actual charters.<sup>112</sup> The problem was the paucity of such decisions: the privilege of judging ordinances had been conceded only recently<sup>113</sup> and litigation never really arose until after the gilds had declined and after they had resorted to practices which were a travesty of their purpose.<sup>114</sup> This was in the very late sixteenth and early seventeenth centuries when there was a spate of cases. The most important, *Davenant v. Hurdis*,<sup>115</sup> concerned the validity of a by-law which required members of the Merchant Taylors to employ cloth-making bretheren on at least half their cloth or pay a forfeit. The plaintiff, Davenant, had refused to comply with the by-law and when distrained for the forfeit brought an action in trespass. Sir Edward was his counsel; Francis Moore<sup>116</sup> represented the Company.

Coke's basic claim was that the by-law tended to create a monopoly. If members could be compelled to employ cloth-making brethren on half their cloth, then eventually they might be required to employ

ments to fix the terms of employment go back as far as 1300. WILBERFORCE, *supra* note 102, at 65. But not even Coke claimed these statutes were declaratory of the common law. R. WRIGHT, *THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS* 40 (1891). There were, of course, cases in which gild privileges were upheld. But these were tried in the prerogative courts. H. FOX, *MONOPOLIES AND PATENTS* 21 n.6 (1949).

In dealing with gild restrictions, Coke and his contemporaries could not invoke the doctrine of conspiracy in restraint of trade because until 1721 combinations of workers to raise wages or otherwise to alter the conditions of employment were not held to be criminal conspiracies at common law. Bryan, *The Development of the English Law of Conspiracy*, 27 *JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE* 257-58 (1909).

112. That is, no court could invalidate a gild charter in the same way the court voided an industrial patent in 1603, and no *exact* precedent existed because of limited common law jurisdiction over institutions having royal sanction.

113. See note 91 *supra* as to when even the ordinances become actionable at common law.

114. Gilds were originally meant to regulate trade whereas in their decline they resorted to restrictive practices. The distinction between regulation and restriction may seem unsound and imprecise today but it had a very real meaning in the sixteenth and seventeenth centuries. It was the difference between setting just as opposed to extortionate prices; between enforcing standards of quality as opposed to adulterating goods. And most important, it was the difference between harmonious government in a trade and acrimonious dissension caused by the exclusion of many who sought membership and training in the craft of their choice.

115. Moore 576, 72 Eng. Rep. 769 (K.B. 1598). Coke did not report this case except within the context of his discussion of monopolies in *The Case of Monopolies*, 11 Co. Rep. 84, 86, 77 Eng. Rep. 1260, 1263 (K.B. 1602), and 2 Inst. \*48.

Other cases were *Norris v. Staps*, Hobart 210, 80 Eng. Rep. 357 (K.B. 1616), and *The Tailors of Ipswich Case*, 11 Co. Rep. 53, 77 Eng. Rep. 1218 (K.B. 1614). See also Kellet, *supra* note 111, at 381-95.

116. That Francis Moore represented the Merchant Tailors notwithstanding his opposition to monopolies in the Parliament of 1597 suggests the apolitical nature of the adversary system even in the sixteenth century. Coke was then Attorney General but seems to have argued the case in a private capacity. The fact of his defence of Davenant in itself proves nothing of his attitude towards monopolies. But the arguments he used in 1599 were precisely those later used by Coke's adversary in *The Case of Monopolies*.

brethren on all of it. Other members would then be put at the mercy of the cloth workers of the Company and cloth workers outside would be put out of work and compelled to subsist on relief. To deprive a skilled craftsman of the right to practice his trade, Coke said, was to deprive him of the "liberty of the subject."<sup>117</sup> In support of his argument, he cited a dictate from the civil law,<sup>118</sup> and a number of cases in which by-laws or patents had been held valid because they were for the public good:

a regulation that all ships must harbor in one port and no other, a grant by the King giving a skilled foreigner the sole right to make sailing canvas, and another giving a skilled projector exclusive right to drain lands, a by-law that all cloth sold in London must first be inspected and passed at Blackwell Hall, a by-law of St. Albans requiring each inhabitant to pay a contribution toward cleaning the town, and by-laws for the maintenance of bridges, walls, and similar public works.<sup>119</sup>

According to Wagner,<sup>120</sup> Coke's argument was weak and the King's Bench accepted it only because Chief Justice Popham was himself opposed to monopolies and because Francis Moore, counsel for the defendant, conceded that the ordinance of the Merchant Taylors would be void if it did in fact create a monopoly. But their unanimous refusal to defend a monopoly suggests a consensus about the prior state of the law. And if Coke had anticipated serious resistance to his argument, he might have cited the few early decisions against gild restrictions. Instead, he counterposed regulations made in the public interest with the ordinance of the Merchant Taylors. The cases which he cited<sup>121</sup> affirmed the right of municipal corporations to make laws which carried out local customs provided they were consonant with law and reason.<sup>122</sup> The test of reason was the public interest, which in *Davenant v. Hurdis* Coke construed to mean full employment of skilled craftsmen. This definition, being perfectly consistent with Tudor policy and with the prevailing view of employment as one of the inherent rights of Englishmen,<sup>123</sup> did not require elaboration.

117. The Case of Monopolies, 11 Co. Rep. 84b, 86b, 77 Eng. Rep. 1260, 1263 (K.B. 1602).

118. Moore at 580, 72 Eng. Rep. at 771.

119. Letwin, *supra* note 73, at 361.

120. Wagner, *The Common Law and Free Enterprise: An Early Case of Monopoly*, 7 ECON. HIST. REV. 217, 218 (1937).

121. The last three by-laws cited by Coke (see text accompanying note 119 *supra*) were upheld in these cases respectively: *The Chamberlain of London's Case*, 5 Co. Rep. 62b, 77 Eng. Rep. 150 (K.B. 1590); *Clark's Case*, 5 Co. Rep. 64, 77 Eng. Rep. 152 (C.P. 1595); and *Jeffrey's Case*, 5 Co. Rep. 66b, 77 Eng. Rep. 155 (C.P. 1590).

122. See *The Case of the City of London*, 8 Co. Rep. 121b, 77 Eng. Rep. 658 (K.B. 1609).

123. M. JUDSON, *THE CRISIS OF THE CONSTITUTION* 37 (1949).

Nevertheless, it received elaboration four years later when the King's Bench for the first time tried and voided royal patents. *The Case of Monopolies*<sup>124</sup> arose on an action brought by Edward Darcy against T. Allen for infringing his privilege to make, import<sup>125</sup> and sell playing cards. The patent had been granted in August of 1598 and thereafter the plaintiff, a Groom of the Privy Council, had had difficulty enforcing it.<sup>126</sup> The Council does not seem to have been able to help him, so that when Elizabeth opened her patents to the scrutiny of the common law, he immediately took advantage of the opportunity to prosecute. The litigation was carried on until Easter term, 1603, when the decision was handed down.

Virtually every account credits Coke with that decision. But in 1603 Coke was Solicitor General and, like the other legal officer of the Crown, the Attorney General, he was obliged to defend the contested patent. The decision in *The Case of Monopolies* was not Coke's own and even if it were it would in no way demonstrate his distortion of precedent.

According to Coke's report,<sup>127</sup> the King's Bench cited *Davenant v. Hurdis* and general statements of principle to void monopolies—statements from Fortescue,<sup>128</sup> the Bible,<sup>129</sup> and a decision in the reign of Henry IV to the effect that royal grants must not burden the subject.<sup>130</sup> The decision in *The Case of Monopolies*, however, rested principally on an appeal to traditional values and public policy of the common law. The court held that all trades furnishing employment to subjects,

124. 11 Co. Rep. 84, 77 Eng. Rep. 1260 (K.B. 1602); Darcy v. Allen, Moore 672, 72 Eng. Rep. 830 (K.B. 1602).

125. Darcy had been granted two distinct patents: one for the exclusive sale and production of playing cards, and one for the exclusive right to import such cards. The court's opposition to the latter was to the use of the royal dispensing power to nullify acts of Parliament and is not referred to in this discussion.

126. For the repeated complaints made by Darcy, see 31 ACTS OF THE PRIVY COUNCIL, 1600-1601 (n.s.), 55-56 (1906), and 32 ACTS OF THE PRIVY COUNCIL, 1601-1604 (n.s.) 132-33, 237, 501 (1907).

127. Coke reported *The Case of Monopolies* twelve years after it was decided. In his discussion, he made it very clear that he supported the decision for the defendant by calling the readers' attention to the "glorious preamble and pretence of this odious monopoly." 11 Co. Rep. 84b, 88b, 77 Eng. Rep. 1260, 1266 (K.B. 1602).

128. Wagner observed that Coke's references to chapter 26 of Fortescue's *De Laudibus Legum Angliae* was incorrect, but that in chapter 85 of his *Third Institutes*, Coke correctly cited chapters 35 and 36. The second of these chapters urged that every inhabitant "is at his full liberty to use and enjoy whatever his farm produceth." Wagner, *Coke and the Rise of Economic Liberalism*, 6 ECON. HIST. REV. 36 n.1 (1935).

129. "No man shall take the nether or the upper millstone to pledge: for he taketh a man's life to pledge." *Deut.* 24:6. Coke concluded that scripture showed that "a man's trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a man's trade, taketh away his life and therefore is so much the more odious . . . ." 3 INST. \*181.

130. *The Case of Monopolies*, 11 Co. Rep. 84b, 86, 77 Eng. Rep. 1260, 1262 (K.B. 1602).

thus preventing idleness, were of value to the Commonwealth and an exclusive grant to exercise such a trade was against the liberty and benefit of the subject; that monopolies were not only prejudicial to the traders excluded but also to the public generally because of their three inseparable incidents: the raising of prices, the deterioration of quality of the goods and the impoverishment of excluded trades.

Technically, the law in question was statutory. But most of the statutes cited were declaratory of the common law. In Coke's words, "admission and allowance of the justices ought to be holden for law."<sup>131</sup> Difficulties arose when the courts had long decided a matter in one way and Parliament then legislated in another.<sup>132</sup> But the problem did not arise here and no one challenged the validity of statutory citations.

One of the more important was the Statute of Labourers, 25 Edw. 3 (1350). It had been enacted because the shortage of labor created by the Black Death put great inflationary pressure on wages and King Edward wished to restore them to their original level. But in addition to fixing wages, the statute compelled all those "able in body and under the age of sixty" to work. Like the Statute of Artificers which Coke also reported, it sought to enforce full employment. Both of these enactments imposed an obligation to work, and it would seem that the "libertye" or right to work upheld by *Davenant v. Hurdis* and *The Case of Monopolies* actually derives from this obligation. If public policy required that all be usefully employed, then certain privileged individuals could not be permitted to deprive others of their trade. The statutes created the obligation; the courts upheld the right. Monopolies led to unemployment and were therefore void at common law.

Monopolies also raised prices arbitrarily. Apart from the new political problem of royal sanction, many laws forbade private attempts to manipulate the market. Coke could draw upon 27 Edw. 3, c. 11 and later acts which prohibited the forestalling of wine and other victuals or wares. Cases involving the infringement of these statutes came before the Star Chamber and the Council. But as the statutes were declaratory, local courts helped to enforce them and so did the courts of common law.<sup>133</sup> A case reported in one of the books of Assize, for

131. 2 INST. \*399 and the table on "laws" following.

132. In the 1620's, Coke fully acknowledged the competence of Parliament to legislate contrary to the common law. See, e.g., 4 INST. \*14. But he warned that statutes which flew in the face of custom would not last very long. 4 INST. \*31.

133. 4 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 377 (1922). Coke cited to the reign of Edward III very frequently because it was then that the first real efforts at national regulation were made and because the statutes of that reign bore a marked resemblance to those of Elizabeth's. Moreover, Coke wanted precedents from as far back in time as pos-



## Coke's "Economic Liberalism"

example, spoke of a Lombard indicted in London for various offences, including "practicing by words to enhance the price of merchandise."<sup>134</sup> It was argued on his behalf that, as his words had not had the intended effect and no damage had been done, he had committed no offence. His plea was overruled, however. As in *The Case of Monopolies*, the court sought no actual evidence of the inseparable incidents to forestalling or monopolies.<sup>135</sup>

The application of the statutes against forestalling and engrossing had always been narrow. But Coke might have noted any number of cases on behalf of the common law's bias against attempts by individuals to manipulate prices. That he did not do so suggests that Coke (and the court whose decision he was reporting) assumed the parallel between the offenses of engrossing and forestalling and monopolies would be obvious to his contemporaries. It was obvious to a complainant in 1587<sup>136</sup> and also to Coke's arch-enemy, Bacon, who wrote: "Monopoly and engrossing differ only in this, that the first is by patent from the King, the other by act of the subject, between party and party; but both are equally injurious to trade and the freedom of the subject, and therefore equally restrained by the common law."<sup>137</sup>

Thus by citing the offences of forestalling and engrossing Coke was appealing to trade restraints generally recognized as analogous to royal monopolies. So far from distorting precedent or arbitrarily imposing his own views, Coke drew upon the common law bias against individual forms of trade intervention and applied it to exclusive privileges conferred by the Crown. His logic was valid; his citations apposite. Anything "liberal" in his opposition to monopolies had likewise been present in ideas or judgments handed down for many centuries.

## IV.

Two "liberal" elements did appear in the indictment of monopolies: the rhetoric of "free trade" and the belief in open markets implicit in demands that prices not be manipulated or artificially controlled. Both

sible. The *Year Books* date from Edward I but the sixteenth century edition which Coke used started only with the reign of Edward III. W. HOLDSWORTH, *SOURCES AND LITERATURE OF ENGLISH LAW* 75-79 (1925).

134. 43 Assizes pl. 38 as cited in 4 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 376 (1922).

135. Mason, *Monopoly in Law and Economics*, 47 *YALE L.J.* 34, 38 (1937).

136. See 2 *TUDOR ECONOMIC DOCUMENTS* 260 (R. H. TAWNEY & E. POWER eds. 1924).

137. Bacon's statement in his *Abridgement* is quoted in H. FOX, *MONOPOLIES AND PATENTS* 21 n.6 (1949). For further information regarding the relationship between forestalling and monopolies, see V. MUND, *OPEN MARKETS: AN ESSENTIAL OF FREE ENTERPRISE* 44-45 (1948).

elements encouraged historians in their estimate of Coke as a proponent of *laissez-faire*. But studied in context, both show him to have been very much a man of his age. "Free trade" had a specific political meaning and involved no rejection of the State; the belief in open markets was a medieval legacy, underpinned by considerations foreign to classical economics.

Instead of looking forward to a competitive and unregulated system of enterprise, Coke looked back to the ideal of the body politic with its emphasis on public good over private gain. This ideal pervaded much of Tudor thought, transmitting the scholastics' distrust of middlemen and speculators as well as the medieval notion of monopoly as a simple act of hoarding or price fixing.<sup>138</sup> Coke's notion was very similar, for apart from royal patents, he knew no more sophisticated form of trade restraint. In the sixteenth and seventeenth centuries, no enterprise was of sufficient size independently<sup>139</sup> to corner the market. Size did not enter into the prevailing definition of monopoly<sup>140</sup> and problems of efficiency and market division never even arose.<sup>141</sup> The grounds for censuring monopolies were therefore what they had always been: fear of fraud and the pursuit of "excessive" gain. However tacitly,<sup>142</sup> Coke believed that prices should be determined justly<sup>143</sup> where all could observe the true weight and quality of an item. Secretiveness seemed to bespeak dishonesty, hence the desire for "open" markets.

Based on moral precept rather than an abstract theory of competitive price determination, Coke's belief in open markets implied no understanding of *laissez-faire*. He came to this belief from assumptions tangibly different from those of economic liberals, and he accorded the State a positive and beneficent role they denied it. Whereas "liberals" were confident that markets might best be kept open without regulation and therefore urged the repeal of engrossing and fore-

138. The term "monopoly" originally covered all pacts by which merchants set prices and created artificial scarcities. De Roover, *Monopoly Theory Prior to Adam Smith: A Revision*, 65 Q.J. ECON. 492, 498-511 (1951).

139. That is, without the sanction of royal protection.

140. See 21 Jac. 1, c. 3 (1623); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division I*, 74 YALE L.J. 775, 783 (1965).

141. For the most part, the problem of collusive agreements to fix prices did not arise either; forestalling and engrossing were acts by one man without a partner.

142. It must be remembered that Coke never presented his ideas on economic policy in any coherent form and that, like his contemporaries, he did not compartmentalize economic, social and political theory.

143. The emphasis here is on the "justness" of prices, so that in time of economic crisis or shortage, Coke supported the right to set prices nationally. The real question in the sixteenth century was which institution ought to have final judgment as to price level—gilds, corporations, courts or Council.

stalling laws,<sup>144</sup> Coke upheld those laws,<sup>145</sup> convinced that if ever trade were left free individuals would selfishly try to impose restraints. He welcomed State efforts to prevent monopolies, just as he had welcomed State efforts to maintain full employment and an adequate supply of food.

It was the head of state, however, who created the most odious monopolies of all. Exclusive as well as restrictive, royal grants of privilege aroused great protest. And because that protest was directed against a form of central intervention, it found expression in peculiarly modern rhetoric. A cry went up for trade free of royal privileges. It was supposed to have been silenced by Elizabeth's concession of common law jurisdiction. But it was not silenced and in his report of *The Case of Monopolies*, Coke upheld the right of Englishmen to "freedom of trade and traffic."

In view of his support for the major enactments of Tudor paternalism, it must be clear that "free trade" meant something rather different to Coke than to economic liberals. Implying no rejection of parliamentary regulation, it meant in fact trade free from arbitrary and exclusive privileges *bestowed by the Crown*. It was a political argument; Coke's citations in this section of his report of *The Case of Monopolies*<sup>146</sup> all involved efforts of the Crown to by-pass Parliament. Many of those efforts had as little to do with restrictive privileges as with unregulated trade. Wagner thought them entirely irrelevant and indeed he called Coke a legal liar.<sup>147</sup> But Wagner mistakenly evaluated

144. Of the important classical theorists, Adam Smith was most concerned about these laws, for they were still in force when he wrote. He compared the fear of engrossing and forestalling "to the popular terrors and suspicions of witchcraft," observing that the statute of Edward VI "by prohibiting as much as possible any middle man from coming between the grower and the consumer, endeavored to annihilate a trade, of which the free exercise is not only the best palliative of the inconveniences of a dearth but the best preventative of that calamity." He attributed the enactment of the law to popular odium against the trader and the tendency in time of scarcity to impute distress to the avarice of the corn merchant; he attacked the law as preventing the proper division of labor and imposing injurious restraints on trade. See A. SMITH, *THE WEALTH OF NATIONS*, bk. IV, ch. 5 (1937).

145. See p. 1334 *supra*.

146. The "free trade" argument constituted only one section of the indictment of monopolies.

147. This charge runs throughout Wagner's discussion of *The Case of Monopolies* in *Coke and the Rise of Economic Liberalism*, 6 *ECON. HIST. REV.* 30, 38-42 (1935).

Wagner's difficulty was in part Coke's fault because many of the cases or statutory citations bearing on the "free trade" argument were not mentioned until Coke wrote his *Institutes* at which time he was more daring in his political views than when he reported *The Case of Monopolies*. Many of the citations discussed above appeared only in the *Institutes* where their relevance specifically to "free trade" is not always clear.

On the other hand, Wagner ignored Coke's injunction to interpret statutes according to the intention of their authors. "The rehearsal or preamble of [a] statute," Coke said, "is a good means to find out the meaning of the statute, and as it were a key to open the understanding thereof." 1 *INST.* \*79. Had Wagner followed Coke's injunction, he might have found more logic to the citations than he did.

Coke's citations in terms of preconceived, modern notions of free trade.

Coke cited,<sup>148</sup> for example, 9 Edw. 3, c. 1 & 2 which provided that

all Merchants, Strangers and Denizens, and all other and every of them . . . that will buy or sell Corn, Wines, . . . Flesh, Fish . . . and all other things vendible, from whence soever they come by For-  
eigners or Denizens, *at what Place soever it be, City, Borough, Town, Port of the Sea, Fair, Market*, or elsewhere within the Realm, *Within franchise or without*, may freely without Interruption sell them to what Persons it shall please them . . . .  
(Emphasis added.)

This statute was confirmed, as Coke went on to note, by 25 Edw. 3, c. 2.<sup>149</sup> Both seemingly enacted complete freedom of commerce. But the reason Coke cited them was because they were to be observed notwithstanding any charter or letter patent of the King to the contrary. That this was his reason is suggested not only by the context of the citations, but by his following reference to article 18 of Magna Carta.

According to his own discussion of the Charter,<sup>150</sup> article 18 dealt with the procedure to be followed in attaching the personal estates of Crown servants who were also Crown debtors. Specifically, it provided that

If any that holdeth of us lay-fee do die, and our sheriff or bailiff do shew our letters patent of our summon for debt, which the dead man did owe to us; it shall be lawful to our sheriff or bailiff to attach and inroll all the goods and chattels of the dead, being found in the said fee . . . *to the value of the same debt* . . . (emphasis added).

The King had previously attached the whole of the decedent's estate, or as much as he could, not just the equivalent amount owed.<sup>151</sup> Thus article 18 limited the use of the King's letters patent.

Coke also cited articles 29 and 30 of Magna Carta.<sup>152</sup> The former was the "due process" provision, significant because it forbade the King arbitrarily to seize a man's goods, and restricted his prerogative powers. Article 30 granted safe conduct to merchants "to buy and sell without any manner of evil tolts, by the old and rightful customs."

148. The Case of Monopolies, 11 Co. Rep. 84b, 88, 77 Eng. Rep. 1260, 1265 (K.B. 1602). Wagner was wrong in saying Coke cited 9 Edw. 3, c. 21, though right in suggesting the irrelevance of that particular statute to Coke's argument.

149. The Case of Monopolies, 11 Co. Rep. 84b, 88a, 77 Eng. Rep. 1260, 1265 (K.B. 1602).

150. Coke annotated the 1216 edition of the Charter in the Second Part of his *Institutes*.

151. W. McKECHNIE, *MAGNA CARTA* 322-23 (2d ed. 1958).

152. 2 INST. \*1-78.

It has been objected that the provision applied only to merchant strangers.<sup>153</sup> This is true and even Coke recognized the scope of the article.<sup>154</sup> But if he was interested in trade free from arbitrary duties imposed by the King and not free trade, then the limited scope of article 30 would be irrelevant.

That Coke was interested in royal restraints is again suggested by his supporting citations. In the Third Part of his *Institutes*, he mentioned the petition of the House of Commons to Richard II against the special trading privileges granted to Yarmouth.<sup>155</sup> The petition urged that such privileges contravened a statute recently confirmed. The statute was 2 Rich. 2, c. 1 which in turn confirmed 9 Edw. 3, c. 1, the importance of which has just been noted. Coke also found a precedent from the reign of Philip and Mary. They had granted a charter to Southampton, making the town the sole port of entry for malmsey and allowing it to levy a treble duty. But in 1560 the grant was deemed by "all the justices of England" to be a "restriction of the liberty of the subject" and "against the laws and statutes of the realm"—namely Magna Carta, art. 30; 9 Edw. 3, c. 1; 25 Edw. 3, c. 2.<sup>156</sup>

The most controversial of Coke's examples was *Peaches's* (or *Peeche's*) *Case*,<sup>157</sup> in which the Parliament of 1376 censured his patent for the exclusive right to sell sweet wines at retail in London. One critic has suggested that Peache was punished because of his connections with John of Gaunt and that he was a victim of political rivalries.<sup>158</sup> Another has suggested that Peache was really punished for the flagrant use he made of his privilege by charging extortionate prices.<sup>159</sup> Both observed that Parliament challenged the use Peache made of his privilege and not the King's right to grant the privilege. The decision in *The Case of Monopolies*, however, asserted that extortionate prices were by definition a necessary result of monopoly and Peache's case provided evidence to that effect. The political details of the fourteenth century were of no interest to common lawyers in the seventeenth. And these

153. See W. McKECHNIE, *supra* note 151, at 400.

154. 2 INST. \*57.

155. 3 INST. \*181.

156. *Id.*

157. ROTULI PARLIAMENTORUM, 50 Edw. 3, No. 33 (1376). Coke was not the first to cite this case. It was cited during the debates over monopolies in 1601. See Mr. Laurence Hyde's statement in the House of Commons, 2 TUDOR ECONOMIC DOCUMENTS 273 (R. H. Tawney & E. Power eds. 1924).

158. Letwin, *supra* note 73, at 355, 358.

159. Wagner, *Coke and the Rise of Economic Liberalism*, 6 ECON. HIST. REV. 30, 41 (1935).

details aside, the case revealed once again the danger of abuse in arbitrary interventions by the Crown.

Coke's citations all referred to attempts by the Crown to act without Parliament. Had he wanted to make a generalized argument in favor of unregulated commerce, Coke might also have cited statutory regulations and monopolies having statutory sanction.<sup>160</sup> But he did not. And one can only conclude that "freedom of trade and traffic" meant little more than trade free from exclusive royal privileges; that Coke's meaning fully accorded with parliamentary usage. In the early seventeenth century, several bills for "free trade" were debated in the House of Commons.<sup>161</sup> Yet they too aimed only at broadening the membership of trade companies or abolishing royal patents of monopoly. Members who supported these bills never denied the efficacy of economic regulation. None saw any inconsistency when Coke introduced "A Bill for Free Trade"<sup>162</sup> in the same session he argued against the export of wool, or when he declared freedom to be the life of trade<sup>163</sup> in the same session he argued against the import of Spanish tobacco.

Both in Parliament and in court, "free trade" was far too narrow to permit a *laissez-faire* construction. It was a political slogan used by Coke in a political context in his report of *The Case of Monopolies*. Darcy had defended his privileges<sup>164</sup> as lawful emanations of the Crown prerogative to regulate foreign trade and generally to act *pro bono publico*. Neither Coke nor the King's Bench was prepared to deny the legitimacy of this prerogative.<sup>165</sup> But on the basis of common law doctrine they (rightfully) voided all royal patents of monopoly and not just Darcy's. This came perilously close to denying the Crown's right to grant patents altogether, hence Coke's elaborate attempt to justify the court's decision by demonstrating how frequently the Crown had misinterpreted the public interest<sup>166</sup> and how frequently royal

160. Unlike industrial patents of monopoly, most municipal charters had received parliamentary endorsement, as had many of the trading corporations.

161. In May of 1606, Parliament legislated against the Spanish Company in an "Act to enable all his Majesty's loving subjects of England and Wales to trade freely into the dominions of Spain, Portugal and France." 4 Jac. 1, c. 9 (1606). In 1621, the trade of the Shrewsbury drapers was thrown open to all by an act "for the full liberty of buying and selling of Welsh clothes." In all cases, the sweeping rhetoric of free trade applied to very specific provisions.

162. This was the original title of the Statute of Monopolies.

163. 1 JOURNALS OF THE HOUSE OF COMMONS 589 (April 24, 1621).

164. And Coke, as his counsel, had presented his claims to the court in 1603.

165. In fact, no one challenged this prerogative. The problem was to define its scope. See M. JUDSON, *THE CRISIS OF THE CONSTITUTION*, especially ch. 1 (1949).

166. Technically, the Crown could still do no wrong; Coke and other critics of royal policy all attributed errors to faulty advice. This led them to claim parliamentary say over the choice of Councillors, although this was done not in the name of cabinet respon-

actions had aroused protest. The "free trade" argument was used first to fill a constitutional no-man's land and later to justify Parliament's invasion of the royal prerogative.

V.

Provoked for twenty years by King James' flagrant disregard for the common law, the Parliament of 1623 finally enacted the declaratory Statute of Monopolies.<sup>167</sup> It was drafted principally by Coke who had also chaired the Committee on Grievances which exposed the need for legislative reform.<sup>168</sup> Except for a few political concessions, the statute did very nearly embody Coke's views at the most radical stage of his career. Yet it contradicts even the most considered aspects of the *laissez-faire* thesis. It reveals Coke's complete unfamiliarity with modern notions of competition and his willingness to sacrifice industrial progress to the needs of full employment, the selectivity of his opposition to monopolies and once again, the political cast of that opposition.

In the statute, Coke defined monopoly as "an institution or allowance by the King" and explicitly reserved to Parliament the right to grant exclusive privileges.<sup>169</sup> In addition, by drastically limiting the scope of his attack on monopolies, Coke by-passed a splendid opportunity to create more competitive conditions of trade. Section 1 of the statute seemed to void all institutions exercising exclusive control of any product or form of commerce,

all monopolies and all commissions, grants, licenses, charters and letters patent heretofore made or granted or heretofore to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, or using of anything within this realm.

The comprehensiveness of this provision, however, was limited by qualifying clauses. The Statute did not include printing, the production of saltpeter, gunpowder and other products deemed essential to

sibility but of Parliament as the defender of the public interest. For Coke's belief (at least in the 1620's) that Parliament was "accountable to a publique trust" see *id.* 236.

167. 21 Jac. 1, c. 3 (1623).

168. Coke's role in the monopoly controversy is best explained by Elizabeth Read Foster in *The Procedure of the House of Commons against Patents and Monopolies, 1621-24*, in *CONFLICT IN STUART ENGLAND 57-87* (W. Aiden & B. Henning eds. 1960).

169. Parliament did in fact make use of this right, as when in 1624 it incorporated the Sheffield cutlers. G. CLARK, *THE WEALTH OF ENGLAND, 1496-1760*, at 122 (1947). Another example, and one which particularly demonstrates the political aspect of the monopoly controversy, is the granting by Parliament of Darcy's monopoly of playing cards to the Company of Card Players. See Letwin, *supra* note 73, at 367.

the realm. Rights to the exclusive production of new processes or machines were likewise excepted, for the Statute recognized the legitimacy of a copyright patent.<sup>170</sup> Section 9 protected the "liberties" and customs of corporations so that it remained perfectly legal for a city like London to prevent "foreigners" from keeping any shop or using any trade within its limits.<sup>171</sup> Section 9 also excepted companies which enjoyed the exclusive privilege of trading with specific countries or in specific commodities. Since most foreign trade was controlled by corporations, this provision excluded a particularly large class of monopolies.

The same class of monopolies dealt with in section 9 had likewise been excluded from an act<sup>172</sup> framed by Commons in 1601, and Coke had to consider Parliament's wish to preserve what remained of the medieval corporate structure and even certain forms of trade privilege. "Landed" lords of the upper house thought statutory proscription of all corporations would constitute too great an infringement of the King's prerogative.<sup>173</sup> "Patriotic" commoners were often shareholders in trade companies and anxious to retain their privileges. Self-interest apart, they foresaw only chaos if all commerce were free. In 1586-1587, the privileges of the Merchant Adventurers had been revoked in an attempt to grant "libertye" to English and foreign strangers to sell cloth.<sup>174</sup> The experiment failed as did the attempt in 1604 to "free" the Levant trade from monopoly control.<sup>175</sup>

All these considerations plus the gravity of the trade crisis<sup>176</sup> in 1623 must have weighed on Coke as he formulated Statute of Monopolies. But personally, he too seems to have believed the company system essential to the maintenance of an ordered trade. He and other stalwart critics of monopolies knew that in addition to exploiting exclusive rights to specific routes or products, companies created the very conditions essential to trade. The Crown at that time was unable to maintain fortresses or consuls or to protect merchants against confiscation.

170. See pp. 1355-58 *infra*.

171. Coke had upheld that principle in *The City of London's Case*, 8 Co. Rep. 12b, 77 Eng. Rep. 658 (K.B. 1609).

172. A. FRIIS, ALDERMAN COCKAYNE'S PROJECT 149 (1917).

173. See Coke's report of a conference with the Lords in 1 JOURNAL OF THE HOUSE OF COMMONS 770 (April 19, 1624).

174. Gould, *The Crisis in the Export Trade, 1586-1587*, 71 ENG. HIST. REV. 212-22 (1956).

175. Durham, *The Relations of the Crown to Trade under James I*, 13 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY (N.S.) 205-06 (1899).

176. Because the debate on monopolies coincided with a trade crisis, the consequences of a sudden revocation of company privileges seemed particularly threatening. Both Coke and Sir Dudley Digges agreed that this course would only hinder trade. 1 JOURNAL OF THE HOUSE OF COMMONS 612 (May 7, 1621).



Companies had come to provide these services and without them most merchants would hardly venture forth.

For this reason and others,<sup>177</sup> Coke had approved Elizabeth's confirmation of the charter of the Russia Company.<sup>178</sup> He had settled the charter of the Virginia Company<sup>179</sup> and approved that of the East India Company<sup>180</sup> as well as approving the Exeter Merchants' right to trade with France exclusive of all other merchants of Exeter.<sup>181</sup> It might perhaps be argued that Coke was then in the service of the Crown and therefore obliged to endorse the policy of corporate monopolies. Yet except for his later objection to the East India Company's export of bullion, Coke never retracted his support of these companies. He endorsed, unequivocally, corporations "erected for the Maintenance, Enlargement, or ordering of any Trade of Merchandize . . . ."<sup>182</sup>

Whether joint stock or regulated, virtually all those corporations were monopolies.<sup>183</sup> Their charters bestowed the exclusive right to trade with given countries or in given commodities or both. The Levant Company,<sup>184</sup> for example, had the sole right of trade with Turkey and Venice and the sole right to import currants and wines from Candia; the French, Spanish and East India Companies were all assigned territorial spheres. No competition existed among companies. And more important, no merchant not a member could trade without the permission of the company concerned.<sup>185</sup> If he did, he was liable to prosecution as an "interloper."

177. One consideration, often overlooked, arose in *Michelborne v. Michelborne*, 2 Brownl. & Golds. 296, 123 Eng. Rep. 952 (C.P. 1609), in which Coke held that merchants trading with infidel nations had to have a license from the King because of the danger of being converted from the Christian religion. Infidel nations were by definition "unfriendly" and it was therefore essential to provide some institutional guarantees of the safety of traders. In addition, Coke and his contemporaries took into consideration whether or not a company was opening up a new trade route. If so, they did not question the need for corporate control.

178. His approval is cited in *The Great Case of Monopolies (East India Co. v. Sandys)*, 10 Howell's State Trials 371, 547-48 (1684). That was the case in which the validity of the East India Company's charter was unsuccessfully challenged.

179. F. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* 31 (1901).

180. *The Great Case of Monopolies*, 10 Howell's State Trials 371, 551 (1684).

181. *Id.* at 547.

182. Statute of Monopolies § 9, 21 Jac. 1, c. 3 (1623).

183. By far the greatest protest in Coke's day was directed against the joint stock companies. Even Adam Smith later attacked them, relying on the petitions of merchants who wanted to secure entrance into trade without the cost of purchasing shares. The cost of these shares and also the limited number of subscriptions were actually the real problem. For as W. R. Scott has shown, the shares were technically open to all. 1 W. SCOTT, *JOINT STOCK COMPANIES TO 1720*, 122, 442-53 (1912). With regard to the regulated companies, most criticism came from "outport" merchants, too far from the London-based companies actively to participate in their trade.

184. 2 E. LIPSON, *THE ECONOMIC HISTORY OF ENGLAND* 338 (1947). That was the charter of 1592.

185. *Id.* 222-25. Lipson aptly observes that "interlopers" were called "free traders." *Id.* 228.

Though surprising in light of the *laissez-faire* thesis, Coke accepted this state of affairs and confined his criticism of trade companies to specific abuses. He inveighed against the charter and practices of the Merchant Adventurers<sup>186</sup> and he disapproved of most early experiments in joint stock finance.<sup>187</sup> But at no time did Coke express a desire for more competitive conditions of trade or attack the company system as such.<sup>188</sup> His great concern was for employment, not competition, and the companies Coke termed monopolies were simply those whose membership was too restrictive. At a meeting of the Privy Council in 1613, he denounced the Merchant Adventurers saying "a thing granted to a hundred is a monopoly if the rest is prohibited."<sup>189</sup> Eight years later, Coke again noted that their membership was grossly disproportionate to the size of the market<sup>190</sup> and his attack on the Spanish Company followed a similar line of reasoning.<sup>191</sup> Exclusiveness led to unemployment and disorder and generally hindered trade whereas the true function<sup>192</sup> of companies was good "order and government."

Again and again, Coke distinguished between trade regulation and trade restriction, and he did so not only with regard to companies but also corporate towns and boroughs and even guilds.<sup>193</sup> He objected when

186. Coke withdrew his support of the New Merchant Adventurers incorporated under Cockayne because the charter, drawn up for them by Bacon, bestowed the right to force and commit non-members without bail or appeal, and also because membership in the corporation was highly restricted. A. FRIS, *supra* note 172, at 245. For his criticism of the Old Company see *id.*, app. D.

187. Though he demurred on particulars, Coke generally approved the Commons' attempt in 1604 to abolish joint stock companies. The attempt was made in April when the House voted on a bill "for all merchants to have free liberty of trade into all countries," a bill which was directed only against the joint stock companies. After 1604, the bills were even more particular in stipulating those companies which were to be reformed or abolished. Durham, *supra* note 175, at 204-08.

188. The most sweeping statement Coke made was when he noted that "New Corporations trading into foreign parts, and at home, which under the fair pretence of order and government, in conclusion tend to the hinderance of trade and traffique, and in the end produce monopolies." 2 Insr. \*540. Yet implicit in that statement was a distinction between companies which were monopolies and those which were not—a distinction based on admission policy and unconcerned with the absence of competition among companies whose membership seemed sufficient.

189. B. M. Caesar Papers, Add. MS. 14027 quoted in A. FRIS, *supra* note 172, app. D. at 459.

190. 1 W. SCOTT, *supra* note 183, at 221. This reference was to the company re-chartered after the failure of the Cockayne project.

191. After peace had been restored with Spain and trade had revived, the membership of the Company became relatively exclusive and it was precisely at that point, in 1606, that Parliament freed the trade of the Company by throwing it open to all merchants. Coke supported the legislation against the Company, as may be seen in 2 JOURNAL OF HOUSE OF LORDS 405 (April 1, 1607), 412 (April 12, 1607).

192. Section 9 of the Statute of Monopolies, 21 Jac. 1, c. 3 (1624), acknowledged the validity of those corporations "erected for the Maintenance, Enlargement, or Ordering of any Trade of Merchandize . . ." See also note 114 *supra*.

193. See T. Travers, Sir Edward Coke and Corporations (unpublished paper, Yale University).

the Newbury Weavers made an ordinance that no person might use the art of weaving within the town unless he had been apprenticed with the town.<sup>194</sup> He objected when the Ipswich Taylors tried to prevent a qualified craftsman from practicing his trade until he had presented himself before them. These restraints, Coke said, were "against the liberty and freedom of the subject, . . . a means of extortion in drawing money from them, either by delay, or some other subtle device, or of oppression of young tradesmen, by the old and rich of the same trade . . ."<sup>195</sup> At the same time, Coke firmly supported the right of guilds to make "ordinances for the good order and government of men of trades and mysteries . . ."<sup>196</sup> Such ordinances might include stipulations of quality or fair wages or marketing time. In the case of municipal corporations, lawful ordinances or customs<sup>197</sup> might include one compelling any citizen, freeman, or stranger within London to bring any broadcloth they wished to sell before the inspectors of Blackwell Hall in order that they might inspect the quality of the cloth.<sup>198</sup> As he said in Commons,<sup>199</sup> "If a Corporation, for the better government of the Town, not contrary to the Law; but, if any sole Restraint, then gone [*sic*]."

The danger of "any sole Restraint" was arbitrary power and unemployment, considerations which underlay Coke's antagonism to royal patents of monopoly as well as to trade corporations. None of his contemporaries disputed the legitimacy of a copyright patent so there was nothing particularly modern about Coke's statutory provision. True, he would have preferred limiting the term to seven rather than fourteen years.<sup>200</sup> But he would not have altered the conditions of the grant, and the conditions differed greatly from those today. With few

194. *Norris v. Staps*, Hobart 210, 80 Eng. Rep. 357 (K.B. 1616). The provision of the ordinance was far more restrictive than the Statute of Artificers and by creating unemployment in fact vitiated one of the purposes of that Statute. See text accompanying notes 216-17 *infra*, to the effect that by giving priority to national policy, Coke was enhancing central power and not contributing to the growth of *laissez-faire*.

195. *The Tailors of Ipswich Case*, 11 Co. Rep. 53, 54, 77 Eng. Rep. 1218, 1220 (K.B. 1614).

196. *Id.*

197. Sometimes Coke sanctioned customs whose lawfulness he would not have recognized had their substance been made by grant. *The Chamberlain of London's Case*, 5 Co. Rep. 62b, 77 Eng. Rep. 150 (K.B. 1590).

198. *Id.* at 63, 77 Eng. Rep. at 151.

199. 1 JOURNALS OF THE HOUSE OF COMMONS 770 (1628).

200. Hulme, *The History of the Patent System under the Prerogative and at Common Law*, 12 L.Q. REV. 141, 153 (1896). According to Hulme, the effect of the Statute of Monopolies was to confirm the practice of the Crown between 1561-1603 and the only innovation was the imposition of a statutory limitation on the term of a grant. But the Statute also disallowed the bestowal of privileges on those who imported rather than invented new processes.

exceptions, improvements in a method of production could not be patented, for it was felt that the subject of a grant ought truly to be a "new manufacture." In the Third Part of his *Institutes*, Coke explained that "if the substance was *in esse* before, and a new addition thereunto, though that addition make the former more profitable, yet is it not a new manufacture in law."<sup>201</sup> If patents for improvements were sanctioned, then existing industries would be prejudicially affected, craftsmen would be displaced and unemployment would result.<sup>202</sup> One with a "capitalist mentality" might find it difficult to understand this discouragement of initiative, but Coke's mentality was anything but capitalist.

Indeed, his outlook was fully rooted in Tudor precept, trained to balance deftly the needs of social harmony against innovation and to value innovation or improvement in terms of its contribution to the State. A desire for industrial self-sufficiency, not an individualistic ethic, had justified copyright patents in the first place and this remained Coke's criterion. When a contemporary proposed to introduce the manufacture of salt into England,<sup>203</sup> and when Zouch undertook to preserve England's forests by making glass from coal instead of wood,<sup>204</sup> Coke was more than willing to grant them exclusive rights of production. He was so enthusiastic as sometimes to be deceived by the claims of prospective patentees. Just as he had been deceived by Cockayne, so he was deceived by Zouch, and did not foresee that the higher cost of smelting glass with coal would raise prices, or that craftsmen skilled in the old methods of glass production would be kept from working.<sup>205</sup> These consequences—when apparent—were abhorrent to Coke, and in 1621 and in 1623 he condemned the patent which had since been transferred to Sir Robert Mansell, a court favorite. To save the bill,<sup>206</sup> he

201. 2 INST. \*184. See also 1 W. HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 628-29 (8th ed., 1824).

202. Part of Coke's concern was for the poor generally. He insisted that "common right be done to all, as well poor as rich." 4 INST. \*183. And he decried those who "ground the face of the poor" by penal laws. 4 INST. \*41. As judge, he went out of his way to support hospitals and other charitable organizations. See, e.g., *The Case of Sutton's Hospital*, 10 Co. Rep. 23, 77 Eng. Rep. 960 (K.B. 1612). For Coke's support of the Poor Law, see 2 INST. \*729.

203. ACTS OF THE PRIVY COUNCIL, 1615-1616, at 6, 7.

204. 1 JOURNAL OF THE HOUSE OF COMMONS 987. T. MENDENHALL, THE SHREWSBURY DRAPERS AND THE WELSH WOOL TRADE IN THE XVI AND XVII CENTURIES 168 n.1 (1953), argues that Coke was inconsistent in his support of the glass patent of 1713.

205. Price, *English Patents of Monopoly*, 1 HARV. ECON. STUDIES 70 (1913). Zouch and his partners did succeed in using the method, and technically Coke and the Committee on Grievances erred in condemning the patent as a "grievance in creation." 2 PROCEEDINGS IN THE HOUSE OF COMMONS, 1620-1621, at 73 (May 14).

206. Price, *supra* note 205, at 76. For Coke's condemnation of the patent, see Foster, *supra* note 168, at 73.

recommended the exception of the patent from the Statute of Monopolies. But the precise terms of its exception invited prosecution by the common law, and Coke explicitly urged<sup>207</sup> that the patent not be renewed at the end of its term.

Significantly, Coke withdrew his support when he realized the patent was not in fact being used to promote new methods of production. Legitimate copyright patents were one thing, arbitrary privileges, another. What Coke and his contemporaries found objectionable was the bestowal of monopolies on court favorites, sycophants and others who knew nothing of the trade which they controlled and who injured craftsmen who did. They sought to remedy the ills which had developed in the administration of the patent system, but not to destroy the system itself.

Coke and his colleagues had been young men at the time Elizabeth initiated<sup>208</sup> the policy of granting exclusive rights of production to foreign craftsmen in order to encourage their immigration to England. They knew that England lagged behind her continental rivals in industrial skill, so much so that in 1562 the patent system was extended to "industrious" denizens who either imported or invented new processes. Thus far, Coke went along with both Tudor policy and practice. But in the 1580's, abuses crept into the system.<sup>209</sup> Licenses to sell as well as to manufacture commodities frequently accompanied patents. *Non obstante* clauses enabled monopolists to disregard statutory prohibitions on the import of certain items and become exclusive traders in those items.<sup>210</sup> More important, Elizabeth now conferred privileges to practice well-established trades. Craftsmen who had hitherto enjoyed the right to work found themselves unemployed or forced to pay a considerable sum to the patentee. Prices rose and often the quality of goods deteriorated.

As usual, matters became worse under James. Not only did he perpetuate his predecessor's abuses, he did so after the courts declared monopolies invalid,<sup>211</sup> and after he himself endorsed the court's decision.<sup>212</sup> He was prodigal in his bestowal of privileges, most of which

207. 1 JOURNAL OF THE HOUSE OF COMMONS 696 (May 1, 1624).

208. There were earlier instances of Crown encouragement of new industries, but they were unsystematic and the privileges conferred were in the nature of safety and safe-passage to aliens.

209. Price, *supra* note 205, at 8-9.

210. For a good discussion of the royal dispensing power, see Birdsall, *Non Obstante—A Study of the Dispensing Power of English Kings*, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCLWAIN* (1936).

211. The decision in *The Case of Monopolies* was handed down in 1602.

212. In 1610, James published his *Book of Bounty*, declaring monopolies to be void and contrary to public policy.

went to court favorites. Making them the beneficiaries of lucrative privileges in no way enhanced their popularity. Resistance and evasion became so rife that James granted his patentees additional wide discretionary power to search and seize rival produce.<sup>213</sup> For all these reasons, Parliament determined to free trade of the restrictions imposed by monopolists. In 1597 and 1601, it protested the abuses of Elizabeth's patentees.<sup>214</sup> In 1604, it assumed the abuses to be a necessary corollary of the grant,<sup>215</sup> and for the next twenty years attempted to restrict the prerogative power of the King.

The chronological progression of the parliamentary protest, the limited scope of the Statute of Monopolies, the specific nature of the grievance against industrial patents, all suggest that had Elizabeth and James held to the original purpose of bestowing trade privileges, there would have been no complaints. Coke aimed neither at creating a "freer" economy nor at destroying its traditional corporate structure. He wanted, basically, to protect the rights of Englishmen<sup>216</sup> and to prevent individuals or institutions from pursuing policies inconsistent with the newly imposed national standards.<sup>217</sup>

With the Tudors there had begun a concerted movement towards uniformity. Coke admired that movement and supported the whole new structure of economic legislation. Loyalty to paternalist policy and also to the common law in fact prompted his opposition to certain monopolies. Historians may point to Coke's radical methods of protest and suggest the later importance of his seemingly modern rhetoric. But when they try to ascribe to Coke an anticipation of *laissez-faire*, they misinterpret profoundly the nature of his thought. For Coke was interested in full employment and not efficiency; just prices and not competition. Far from searching for new economic concepts, he drew upon the Commonwealth ideal, arguing consistently that "trade and traffique cannot be maintained or increased without order and government . . . ."<sup>218</sup>

213. H. FOX, *MONOPOLIES AND PATENTS* 186-88 (1949).

214. For a fine discussion of the early parliamentary protest against monopolies, see J. NEALE, *ELIZABETH I AND HER PARLIAMENTS, 1584-1601* at 352-62 (1966).

215. This was implicit in the decision of *The Case of Monopolies*. See section III *supra*.

216. That is, the right to work, the right to property, and the right not to be subjected to abuses by privileged corporations.

217. Virtually all of the guild ordinances which Coke censured were more restrictive than the provisions of the Statute of Artificers; corporate exclusiveness hampered the general policy of full employment; the practice of forestalling raised prices and helped to create scarcity, thus destroying the balanced polity the Tudors tried to establish. As suggested throughout this article, Coke looked to corporate bodies to administer national policies but not to take the initiative, especially if it proved injurious.

218. *The Case of the City of London*, 8 Co. Rep. 121b, 125, 77 Eng. Rep. 658, 663 (K.B. 1609).

# The Yale Law Journal

Volume 76, Number 7, June 1967

*Editor-in-Chief* WILLIAM D. IVERSON

*Note & Comment  
Editors* LEONARD H. BECKER  
THOMAS C. GREY  
RICHARD S. MARKOVITS  
JEFFREY S. WOOD

*Article & Book  
Review Editors* RUSSELL H. CARPENTER, JR.  
ERIC SCHNAPPER

*Topics Editor* CHARLES H. WHITEBREAD II

*Managing Editor* R. JAMES WOOLSEY

RICHARD AYRES	W. JOHN GLANCY	EDMUND PENDLETON
KENNETH C. BASS III	JOHN P. GODICH	ROGERS III
JOSEPH C. BELL	JULIAN DEAN HELLER	LEONARD RUBINOWITZ
JAMES T. BETTS	PAUL HOFF	THOMAS SCARLETT
R. DAVID BROILES	GARY N. JACOBS	MARK SCHANTZ
JOHN E. BRYSON	THOMAS M. LEMBERG	DAVID SCHOENBROD
JEFFREY A. BURT	DANIEL M. LEWIS	JOHN E. SCHULZ
ALLAN CHAPIN	DAVID B. LYTLE	MARTIN L. SENZEL
RICHARD COTTON	ANGUS C. MACBETH	STEVEN L. SLOCA
CLIFFORD R. DAMMERS	VICTOR MARRERO	JAMES G. SPETH
JOHN DAUM	MELVIN M. MASUDA	MICHAEL T. STAPLETON
MARVIN J. DIAMOND	CHRISTOPHER MAY	JOEL W. STERNMAN
JOHN F. DIENELT	ROBERT McMANUS	EDWARD L. STROHBEHN, JR.
GEOFFREY DRURY	HAMILTON OSBORNE, JR.	GARY C. WALKER
STEPHEN S. DUNHAM	MICHAEL REISS	HARDY WIETING, JR.
RICHARD A. EPSTEIN	JOHN TOWNSEND RICH	HENRY L. WOODWARD
MAX FACTOR III	JOHN C. ROBERTS	MATTHEW ZWERLING

*Copy and Publication  
Manager* JOHN C. ROBERTS

*Business Manager* HAMILTON OSBORNE, JR.

*Business Secretaries* M. OLIVE BUTTERFIELD, PAMELA S. WILLMOTT

## *Student Contributors to This Issue*

Jeffrey S. Wood, *Intermodal Transportation and the Freight Forwarder*  
Richard S. Markovits, *Tie-ins, Reciprocity, and the Leverage Theory*